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U.S. Customs Service

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and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 12

(T.D. 96–64)

RIN 1515–AB94

EMISSIONS STANDARDS FOR IMPORTED NONROAD ENGINES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document sets forth amendments to the Customs Regulations which conform to regulations that have already been adopted by the Environmental Protection Agency (EPA), in order to ensure the compliance of imported nonroad engines with applicable EPA emissions standards required by law.

EFFECTIVE DATE: August 27, 1996.

FOR FURTHER INFORMATION CONTACT: Leo Wells, Trade Compliance Division, (202–927–0771).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Clean Air Act, as amended, (42 U.S.C. 7401 *et seq.),* which has long authorized the Environmental Protection Agency (EPA) to regulate on-highway motor vehicle and engine emissions, was amended in 1990 to extend EPA's regulatory authority to include as well nonroad engines and related vehicles and equipment (see 42 U.S.C. 7521–7525, 7541–7543, 7547, 7549, 7550, 7601(a)). In brief, EPA was given authority, inter alia, to regulate those categories or classes of new nonroad engines and associated vehicles and equipment that contribute to air pollution, if such nonroad emissions have been determined to be significant.

To this end, the EPA has since conducted the requisite studies, and issued regulations in 40 CFR parts 89 and 90, which set emission standards for certain nonroad engines, specifically new nonroad compres-

sion-ignition engines at or above 50 horsepower (37 kilowatts) (nonroad large CI engines) as well as new nonroad spark-ignition engines at or below 25 horsepower (19 kilowatts) (nonroad small SI engines). For a complete discussion of the background and development of EPA's regulations concerning emissions standards for nonroad large CI and small SI engines, see 59 FR 31306 (June 17, 1994) and 60 FR 34582 (July 3, 1995), respectively. The Customs Regulations set forth in this document are applicable to all nonroad engines incorporated into nonroad vehicles or nonroad equipment imported into the United States.

Nonconforming nonroad large CI engines may only be imported by independent commercial importers (ICIs) who hold valid certificates of conformity issued by the EPA (see § 12.74(c)(2), *infra),* unless an exemption or exclusion otherwise applies thereto. The ICI will be responsible for assuring that subsequent to importation, the nonroad engine is properly modified and/or tested to comply with EPA emission and other requirements over its useful life.

By contrast, no ICI program exists for nonconforming nonroad small SI engines. However, an individual may import on a single occasion up to three nonconforming nonroad small SI engines, vehicles or equipment items for personal use (and not for purposes of resale). In fact, with specific exceptions, nonconforming nonroad small SI engines, vehicles and equipment are generally not permitted to be imported for resale. After an individual's limit of three, or after the first importation, additional small SI engines, vehicles, or equipment are not permitted importation, unless an exception or exclusion otherwise so provides.

Exemptions or exclusions to the general restrictions on importing nonconforming nonroad engines are similar to those contained in § 12.73, Customs Regulations (19 CFR 12.73) for nonconforming motor vehicles and their engines, and include exemptions for repair and alteration, testing, precertification, display, national security, hardship, use in competition, and certain nonroad engines proven to be identical, in all material respects, to their corresponding U.S. versions. Furthermore, foreign diplomatic or military personnel on assignment in the U.S. may import a nonconforming nonroad engine exempt from emissions requirements. In addition, nonroad engines greater than 20 original production years old are not subject to EPA emissions requirements.

Accordingly, Customs is amending its regulations to add a new § 12.74 which conforms to the regulations that have already been adopted by EPA, in order to ensure the compliance of imported nonroad engines with applicable EPA emissions standards required by law.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Inasmuch as these amendments merely conform the Customs Regulations to existing law and regulation as noted above, pursuant to

5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*. Nor do these amendments meet the criteria for a "significant regulatory action" under E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspection, Imports, Motor vehicles, Motor vehicle safety, Nonroad engines, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Part 12, Customs Regulations (19 CFR part 12), is amended as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for part 12 continues to read as follows, and the specific authority for § 12.73 is revised by adding a reference to § 12.74 to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.73 and 12.74 also issued under 19 U.S.C. 1484, 42 U.S.C. 7522, 7601;

* * * * * * *

2. Part 12 is amended by revising the undesignated centerhead preceding § 12.73, and by adding a new § 12.74 following § 12.73, to read as follows:

ENTRY OF MOTOR VEHICLES, MOTOR VEHICLE ENGINES AND NONROAD ENGINES UNDER THE CLEAN AIR ACT, AS AMENDED

* * * * * * *

§ 12.74 Nonroad engine compliance with Federal antipollution emission requirements.

(a) *Applicability of EPA requirements.* This section is ancillary to the regulations of the U.S. Environmental Protection Agency (EPA) issued under the Clean Air Act, as amended (42 U.S.C. 7401 *et seq.)*, and found in 40 CFR parts 89 and 90. Nothing in this section should be construed as limiting or changing in any way the applicability of the EPA regulations. Those regulations should be consulted for more detailed informa-

tion concerning EPA emission requirements. These requirements apply to nonroad combustion-ignition engines at or above 37 kilowatts (kW), and nonroad spark-ignition engines at or below 19 kW. For the purpose of this section, the term "nonroad engine" includes all nonroad engines incorporated into nonroad equipment or nonroad vehicles when imported into the United States.

(b) *Importation of complying nonroad engines.* (1) *Labeled engines.* Nonroad engines which in their condition as imported are covered by an EPA certificate of conformity and which bear the manufacturer's label showing such conformity and other EPA-required information shall be deemed in compliance with applicable emission requirements for the purpose of Customs admissibility and entry liquidation determinations. This paragraph does not apply to importations by independent commercial importers covered by paragraph (c) of this section.

(2) *Pending certification.* Nonroad engines otherwise covered by paragraph (b)(1) of this section which were manufactured for compliance with applicable emission requirements, but for which an application for a certificate of conformity is pending with the EPA may be conditionally released from Customs custody pending production of the certificate of conformity within 120 days of release.

(c) *Importation of nonconforming engines.*

(1) *By other than an independent commercial importer (ICI).* Except for nonroad engines imported in the particular circumstances covered by paragraphs (d)-(m) of this section, an individual or business, other than an independent commercial importer (ICI) holding a currently valid EPA certificate of conformity for the same nonroad engine class and fuel type as the engine being imported, may not enter into the United States a nonconforming nonroad engine to which EPA emissions requirements apply. Individuals and businesses may, however, arrange for the importation of nonconforming nonroad engines through an ICI. In these circumstances, the ICI will not act as an agent or broker for Customs transaction purposes unless otherwise licensed or authorized to do so.

(2) *By an ICI.* (i) *Definition.* Generally, an ICI is an importer that holds a certificate of conformity from EPA, but that lacks a contract with a foreign or domestic nonroad engine manufacturer for distributing nonroad engines into the United States market and cannot therefore export as an original equipment manufacturer. Further specific discussion of who qualifies as an ICI is set forth in the EPA regulations.

(ii) *Procedure.* An ICI may enter into the United States certain nonroad engines, only if it holds a currently valid EPA certificate of conformity for the same nonroad engine class and fuel type as the nonroad engines being entered. A "certificate of conformity" is the document which is issued by the Administrator, EPA, to the ICI, and which entitles the ICI to import nonconforming nonroad engines into the United States, and ensure that such nonroad engines are brought into conformance with applicable EPA emissions standards. 40 CFR 89.602–96.

(d) *Importation of nonconforming spark-ignition engines at or below 19 kW.* (1) *General.* A nonconforming engine at or below 19 kW may not be imported by any person, business or ICI, except for purposes other than resale under paragraph (d)(2) of this section, or unless an exemption or exclusion applies as provided in paragraphs (e)-(m) of this section.

(2) *Importation for purposes other than resale.* Any individual may import on a one-time basis 3 or fewer nonconforming spark-ignition engines at or below 19 kW for purposes other than resale under 40 CFR 90.611. Such an engine may be conditionally admitted without prior EPA approval and without bond.

(e) *Exemptions and exclusions from emissions requirements based on age of engine.* The following nonroad engines may be imported by any person and do not have to be shown to be in compliance with emissions requirements before being entitled to admissibility:

(1) All spark-ignition engines greater than 19 kW, unless regulated under 19 CFR 12.73;

(2) All compression-ignition engines less than 37 kW;

(3) Spark-ignition engines less than or equal to 19 kW originally manufactured before the 1997 model year;

(4) Compression-ignition engines greater than or equal to 37 kW but less than 75 kW originally manufactured before January 1, 1998;

(5) Compression-ignition engines greater than or equal to 75 kW but less than 130 kW originally manufactured before January 1, 1997;

(6) Compression-ignition engines greater than or equal to 130 kW but less than or equal to 560 kW originally manufactured before January 1, 1996;

(7) Compression-ignition engines greater than 560 kW originally manufactured before January 1, 2000; and

(8) Engines not otherwise exempt from EPA emission requirements and more than 20 years old. (Age is determined by subtracting the calendar year of production (as opposed to model year) from the calendar year of importation.)

(f) *Exemption for exports.* Nonroad engines which will be used in nonroad vehicles or equipment intended solely for export to a country which does not have in force emissions standards identical to EPA standards are exempt from applicable EPA emissions requirements if both the engine and its container bear a label or tag indicating that it is intended solely for export. 40 CFR 89.909 and 90.909. The EPA publishes in the Federal Register a list of foreign countries that have emissions standards identical to EPA standards.

(g) *Exemptions for diplomats, foreign military personnel and nonresidents.* Subject to the conditions that they are not resold in the United States and are subsequently exported or destroyed or brought into conformity with EPA emissions requirements, the following nonroad engines are exempt from EPA emission requirements:

(1) A nonroad engine imported solely for the personal use of a nonresident importer or consignee where the use will not exceed one year and the engine subsequently will be exported; and

(2) A nonroad engine of a member of the armed forces of a foreign country on assignment in the United States, or of a member of the personnel of a foreign government on assignment in the United States or other individual who comes within the class of persons for whom free entry of nonroad engines has been authorized by the Department of State. For special documentation requirements, see paragraph (n)(4) of this section.

(h) *Exemption for repairs or alterations.* An engine may be imported by anyone solely for repairs or alterations. Under this exemption, the engine may not be sold or leased in the United States. 40 CFR 89.611–96(b)(1) and 90.612(b)(1).

(i) *Testing exemption.* An engine may be imported by anyone solely for testing. Such engine may only be operated as an integral part of the test. 40 CFR 89.611–96(b)(2) and 90.612(b)(2). This exemption is limited to a period not exceeding one year from the date of importation unless a request is made under 40 CFR 89.905(f) or 90.905(f), as applicable, for a one-year extension.

(j) *Precertification exemption.* An engine may be imported by an individual as well as by an ICI for use as a prototype in applying for EPA certification, unless otherwise specified. 40 CFR 89.611–96(b)(3) and 89.906. Unless the engine is brought into conformity within 180 days from the date of entry, it shall be exported or otherwise disposed of subject to paragraph (q) of this section.

(k) *Display exemption.* An engine may be imported by anyone solely for display in relation to a business or the public interest, as determined by EPA, if the engine will not be sold in the United States. This exemption is limited to a period of 12 months or for the duration of the display, whichever is shorter. Two extensions are available of up to 12 months each, if approved by EPA, but, in no case may the total extension period exceed 36 months. 40 CFR 89.611–96(b)(4) and 90.612(b)(3).

(l) *Exemption for engines identical to U.S.-certified versions.* An engine may be imported by its owner other than for resale if it is proven to be identical, in all material respects, to an engine certified by the original manufacturer for sale in the United States. 40 CFR 89.611–96(c)(3) and 90.612(c)(3).

(m) *Exemptions and exclusions based on prior EPA approval.* The following exemptions or exclusions from EPA emission standards apply to nonroad engines, if prior approval has been obtained in writing from EPA:

(1) *Competition exemption.* An engine may be imported for use to propel a vehicle or to power equipment used solely for competition. 40 CFR 89.611–96(e) and 90.612(e);

(2) *National security exemption.* An engine that received a national security exemption in writing from EPA may be imported. 40 CFR 89.611–96(c)(1), 89.908, 90.612(c)(1) and 90.908; and

(3) *Hardship exemption.* An engine that received a hardship exemption in writing from EPA may be imported. 40 CFR 89.911–96(c)(2) and 90.612(c)(2).

(n) *Documentation requirements.* (1) *Exception for conforming engines.* The special documentation requirements of paragraphs (n)(2) and (n)(3) of this section do not apply to the entry into the United States of any nonroad engines shown to be in compliance with applicable emission requirements under paragraph (b)(1) of this section relating to labeling.

(2) *Declarations of other importers.* Release from Customs custody shall be refused with respect to all entries of nonconforming nonroad engines into the United States unless there is filed with the entry in duplicate a declaration in which the importer or consignee declares or affirms its status as an original equipment manufacturer, an ICI holding a relevant certificate of conformity, an individual importer, or other status, and further declares or affirms the status or condition of the imported engines and the circumstances concerning importation including a citation to the specific paragraph in this section upon which application for conditional or final release from Customs custody is made.

(3) *Other documentation and information.* The EPA requires, pursuant to its regulations at 40 CFR 89.604(a) and 40 CFR 90.604(c), that the following information shall be included or submitted with the importer's declaration:

(i) The importer's name, address and telephone number;

(ii) Identification of the engine, including the unique engine number, the engine owner's taxpayer identification number, and his or her current address and telephone number in the United States if different from that provided in paragraph (n)(3)(i) of this section;

(iii) Identification, where applicable, of the place where the engine will be stored until EPA approval of the importer's application to EPA for final admission;

(iv) Authorization for EPA enforcement officers to conduct inspections or testing otherwise permitted by the Clean Air Act and regulations promulgated thereunder;

(v) Identification, in the case of importation by an ICI, of the certificate of conformity by means of which the engine is being imported;

(vi) The date of manufacture of the engine;

(vii) The date of entry;

(viii) The entry number, where applicable;

(ix) Where prior written approval from EPA is required for an exemption or exclusion, a statement to the effect that such EPA approval has been given; and

(x) Such other further information as may be required by the EPA.

(4) *Documentation from diplomats or foreign military personnel.* For entries for which an exemption is claimed under paragraph (g)(2) of this section, a statement must also be included with the declaration, identifying and describing the engine importer's official orders, if any, or, giving the name of the embassy to which the importer is accredited if the importer is a qualifying member of the personnel of a foreign government on assignment in the United States.

(5) *Retention and submission of records to Customs.* Documents supporting the information contained in or accompanying the declaration as set forth in paragraphs (n)(2)–(4) of this section must be retained by the importer for a period of at least 5 years from the date of entry, or withdrawal from warehouse, for consumption of the nonroad engine (see § 162.1c of this chapter), and shall be provided to Customs upon request.

(o) *Release under bond.* If a declaration filed in accordance with paragraph (n)(2) of this section states that the entry is being filed under circumstances described in either paragraph (h), (i), (j), or (k) of this section, the entry shall be accepted only if the importer or consignee gives a bond on Customs Form 301, containing the bond conditions set forth in § 113.62 of this chapter for the production of an EPA statement that the engine is in conformity with Federal emission requirements. Within the period in paragraph (i) or (j) of this section, or in the case of paragraph (h) or (k) of this section, the period specified by EPA in its authorization for an exemption, or such additional period as the port director of Customs may allow for good cause shown, the importer or consignee shall deliver to the port director the prescribed statement. If the statement is not delivered to the director of the port of entry within the specified period, the importer or consignee shall deliver or cause to be delivered to the port director those engines which were released under a bond required by this paragraph. In the event that the engine is not redelivered within 5 days following the specified period, liquidated damages shall be assessed in the full amount of the bond, if it is a single entry bond, or if a continuous bond is used, the amount that would have been taken under a single entry bond. Liquidated damages under the bond generally would be equal to 3 times the value of the merchandise involved in the default (see § 113.62(k) of this chapter).

(p) *Notice of inadmissibility or detention.* If an engine is determined to be inadmissible before release from Customs custody, or inadmissible after release from Customs custody, the importer or consignee shall be notified in writing of the inadmissibility determination and/or redelivery requirement. However, if an engine cannot be released from Customs custody merely because the importer has failed to furnish with the entry the information required by paragraph (n) of this section, the engine shall be held in detention by the port director for a period not to exceed 30 days after filing of the entry at the risk and expense of the importer pending submission of the missing information. An additional 30-day extension may be granted by the port director upon

application for good cause shown. If at the expiration of a period not over 60 days the required documentation has not been filed, a notice of inadmissibility will be issued.

(q) *Disposal of engines not entitled to admission.* An engine denied admission under any provision of this section shall be disposed of in accordance with applicable Customs laws and regulations. However, an engine will not be disposed of in a manner in which it may ultimately either directly or indirectly reach a consumer in a condition in which it is not in conformity with applicable EPA emission requirements.

(r) *Prohibited importations.* The importation of nonroad engines otherwise than in accordance with this section and the regulations of EPA in 40 CFR parts 89 and 90 is prohibited.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: June 24, 1996.

DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 27, 1996 (61 FR 43960)]

(T.D. 96–65)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR AUGUST 1996

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

Greece drachma:

August 1, 1996	$0.004254
August 2, 1996	.004239
August 3, 1996	.004239
August 4, 1996	.004239
August 5, 1996	.004214
August 6, 1996	.004220
August 7, 1996	.004216
August 8, 1996	.004219
August 9, 1996	.004223
August 10, 1996	.004223
August 11, 1996	.004223
August 12, 1996	.004231

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 1996 (continued):

Greece drachma (continued):

August 13, 1996	$0.004231
August 14, 1996	.004199
August 15, 1996	.004206
August 16, 1996	.004199
August 17, 1996	.004199
August 18, 1996	.004199
August 19, 1996	.004206
August 20, 1996	.004207
August 21, 1996	.004215
August 22, 1996	.004202
August 23, 1996	.004215
August 24, 1996	.004215
August 25, 1996	.004215
August 26, 1996	.004228
August 27, 1996	.004228
August 28, 1996	.004233
August 29, 1996	.004215
August 30, 1996	.004228
August 31, 1996	.004228

South Korea won:

August 1, 1996	$0.001230
August 2, 1996	.001229
August 3, 1996	.001229
August 4, 1996	.001229
August 5, 1996	.001228
August 6, 1996	.001228
August 7, 1996	.001228
August 8, 1996	.001228
August 9, 1996	.001228
August 10, 1996	.001228
August 11, 1996	.001228
August 12, 1996	.001227
August 13, 1996	.001224
August 14, 1996	.001217
August 15, 1996	.001217
August 16, 1996	.001219
August 17, 1996	.001219
August 18, 1996	.001219
August 19, 1996	.001220
August 20, 1996	.001220
August 21, 1996	.001221
August 22, 1996	.001221
August 23, 1996	.001222
August 24, 1996	.001222
August 25, 1996	.001222
August 26, 1996	.001222
August 27, 1996	.001221
August 28, 1996	.001220
August 29, 1996	.001220
August 30, 1996	.001221
August 31, 1996	.001221

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for August 1996 (continued):

Taiwan N.T. dollar:

August 1, 1996	$0.036337
August 2, 1996	.036350
August 3, 1996	.036350
August 4, 1996	.036350
August 5, 1996	.036364
August 6, 1996	.036390
August 7, 1996	.036377
August 8, 1996	.036350
August 9, 1996	.036403
August 10, 1996	.036403
August 11, 1996	.036403
August 12, 1996	.036364
August 13, 1996	.036350
August 14, 1996	.036377
August 15, 1996	.036377
August 16, 1996	.036377
August 17, 1996	.036377
August 18, 1996	.036377
August 19, 1996	.036377
August 20, 1996	.036324
August 21, 1996	.036350
August 22, 1996	.036350
August 23, 1996	.036364
August 24, 1996	.036364
August 25, 1996	.036364
August 26, 1996	.036390
August 27, 1996	.036390
August 28, 1996	.036364
August 29, 1996	.036377
August 30, 1996	.036403
August 31, 1996	.036403

Dated: September 3, 1996.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 96–66)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR AUGUST 1996

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 96–55 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

South Africa, Republic of, rand:

August 14, 1996	$0.219322
August 15, 1996	.218962
August 16, 1996	.219394
August 17, 1996	.219394
August 18, 1996	.219394
August 19, 1996	.218531
August 20, 1996	.218962
August 21, 1996	.219250
August 22, 1996	.219298

Dated: September 3, 1996.

FRANK CANTONE,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

ANNOUNCEMENT OF PROGRAM TEST: GENERAL AVIATION TELEPHONIC ENTRY (GATE)

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice announces Customs plan to conduct a general test to evaluate the effectiveness of a new operations procedure regarding the telephonic entry of certain pre-registered, passenger-carrying, general aviation aircraft flights entering the United States directly from Canada. This notice invites public comments concerning any aspect of the test, informs interested members of the public of the eligibility requirements for voluntary participation in the test, and describes the basis on which Customs will select participants for the test.

EFFECTIVE DATES: Applications will be available and accepted at local Customs offices beginning September 5, 1996. The test will commence no earlier than November 4, 1996, and will be evaluated after 1 year. Comments must be received on or before September 30, 1996. Anyone interested in participating in the test should contact the nearest Customs office.

ADDRESSES: Written comments regarding this notice and information submitted to be considered for voluntary participation in the test should be addressed to the Process Owner, Passenger Operations Division, Room 4413, Washington, DC 20229–0001.

FOR FURTHER INFORMATION CONTACT: Robert Jacksta (202) 927–0530.

SUPPLEMENTARY INFORMATION:

BACKGROUND

At the February 24, 1995, Summit in Ottawa, Canada, President Clinton and Canadian Prime Minister Chretien announced the signing of the United States/Canada Accord on our Shared Border for enhancing the management of the U.S.-Canada border. 31 Weekly Comp.Pres.Doc. 305. The Shared Border Accord sets out initiatives to

promote trade, tourism, and travel between the two countries by reducing barriers for legitimate importers, exporters, and travelers, while strengthening enforcement capabilities to stop the flow of illegal or irregular movement of goods and people and reducing costs for both governments and users. One of the specific initiatives in the Shared Border Accord is a frequent traveler program known as General Aviation Telephonic Entry (GATE), which is intended to facilitate the entry of certain pre-registered, passenger-carrying, general aviation aircraft flights entering the United States directly from Canada, while still preserving security by maintaining random checks of incoming private aircraft.

Customs is ready to begin testing the GATE program. For programs designed to evaluate the effectiveness of new technology or operations procedures regarding the processing of passengers, vessels, or merchandise, § 101.9(a) of the Customs Regulations (19 CFR 101.9(a)), implements the general testing procedures. This test is established pursuant to that regulation.

I. *Description of proposed test:*

THE CONCEPT OF TELEPHONIC ENTRY

Any aircraft arriving in the United States from a foreign airport or place is required to (1) give advance notification of its arrival, (2) immediately report its arrival to Customs, and (3) land at the airport designated by Customs for entry. *See*, 19 U.S.C. 1433(c) and implementing Customs Regulations at 19 CFR Part 122, subparts C and D. Individual passengers are also required to report their arrival to Customs. *See*, 19 U.S.C. 1459 and implementing Customs Regulations at 19 CFR 123.1. Because historical data on certain general aviation aircraft (aircraft comprising private and corporate aircraft, and air ambulances that have a seating capacity of fifteen or fewer passengers) indicates a high degree of compliance with Customs and other federal agency reporting laws, Customs has developed the GATE program to allow certain pre-registered, passenger-carrying, flights of such aircraft to report their entry telephonically when entering the United States directly from Canada. To provide a means for measuring the effectiveness of GATE, random inspections will be built into the program. Thus, the GATE program would combine the proven benefits of facilitation and selectivity, thereby freeing valuable Customs resources for use in other areas.

The test will be implemented at designated airports of entry located nation-wide. During the test period, pilots will give advance notice of their arrival—rom a minimum of 3 hours up to a maximum of 72 hours in advance—to Customs by calling 1–800–98–CLEAR, and may receive advance clearance to land at airports that are not staffed by Customs, but which have been designated by a port director for program use, provided that they receive a telephonic entry number.

REGULATORY PROVISIONS AFFECTED

During the GATE test, participants will be provided with a telephonic entry number in lieu of normal inspection requirements. Accordingly, the normal arrival reporting and landing requirements of Part 122 of the Customs Regulations (19 CFR Part 122) will not be followed. However, participants will still be subject to civil and criminal penalties and sanctions for any violations of U.S. Customs laws.

II. *Eligibility criteria:*

A. *Aircraft & Airports of Entry:*

Only U.S.- and Canadian-registered general aviation aircraft that will arrive in the United States directly from Canada are eligible to participate in the GATE test. For purposes of this test, the term "general aviation aircraft" means aircraft comprising private and corporate aircraft, and air ambulances returning to the U.S. with crew members only, that have a seating capacity of fifteen or fewer passengers.

Aircraft transiting Canada are not eligible for this test. Further, aircraft that will carry cargo, merchandise requiring the payment of Customs duties, restricted or prohibited food products or other articles, or monetary instruments in excess of $10,000, will not qualify for this test.

Qualified flights selected to participate in the GATE test will be allowed to land at most airports of entry located within a reasonable commuting distance of a port serviced by Customs, provided that the approving port director has designated the airport for GATE test use. Most municipally-owned airports and other airports located outside a particular port's limits may be selected for landing under the GATE test. The port director approving the application for GATE participation will designate, on a case-by-case basis, which airports of entry may be used for landing. Factors that will be considered include:

— Willingness of an airport operator to participate in the GATE test;
— The distance to the airport from the nearest Customs port, commuting time required for Customs officers, and Customs officer safety;
— Whether a secure place to work is provided at the airport; and
— Whether communications equipment is accessible.

B. *Persons:*

Participation in the GATE test is voluntary. Only U.S. citizens, permanent resident aliens of the United States, Canadian citizens, or landed immigrants in Canada from Commonwealth countries, and who are regular passengers or flight crews of pre-registered flights, will be considered for this test. Each applicant should have had (during the past year) a "face to face" inspection by either a U.S. Immigration or Customs officer, which clearly demonstrates the person's right to legally enter the United States, and must agree to carry all necessary personal identification and immigration documents. Persons who have not had a "face to face" inspection during the past year may, nonethe-

less, meet this requirement by reporting to the nearest Customs office with proof of citizenship.

Persons with evidence of a pending or past investigation which establishes illegal or dishonest conduct, persons involved in a violation of Customs laws (civil, narcotic violations, smuggling), and persons found to be inadmissible under the Immigration laws of the United States are not eligible for this test.

Participation in this test will not constitute confidential information, and lists of participants will be made available to the public upon written request.

III. *Test Application Procedure:*

General aviation aircraft owners, operators, and pilots who wish to have their passenger-carrying flights considered for participation in the GATE test should contact the Customs office nearest the airport where they normally land for Customs inspection after the effective date for this notice specified above, to request an application for General Aviation Telephonic Entry Program form (Customs Form 442). Applications must be filed with Customs 45 days prior to the date of the scheduled flight in order to be considered for participation in the GATE test.

SELECTION STANDARDS

Flights will be approved/denied for the GATE test based on whether the personnel/aircraft information provided on the CF 442 by an applicant meets all the above eligibility criteria. The local port office will determine the qualifications of all passengers/pilots/aircraft, and a letter approving or denying the test application will be sent to the applicant. Aircraft owners/operators must agree not to allow their general aviation aircraft to carry passengers who are not listed and approved on the application. (To allow for the proper accounting of last-minute personnel changes to an application already on file with Customs, an Application Addendum form must be completed and sent to the port where the original application was submitted). Further, aircraft owners/operators must agree not to allow persons to carry dutiable/commercial merchandise, restricted or prohibited food products or other articles, or monetary instruments of $ 10,000 or more on test flights.

If an application is denied for any reason other than by reason of a request by the applicant to land at a particular airport (for example, a denial based on information concerning passengers, pilots, or the aircraft), the applicant may appeal the decision to the port director within 10 working days from receipt of the denial letter. If the appeal to the port director results in another denial, then the applicant may appeal directly to the Passenger Process Owner at Customs' Headquarters within 10 working days from receipt of the second denial letter.

IV. *Test evaluation criteria:*

Customs will review all public comments received concerning any aspect of the test program or procedures, finalize procedures in light of

those comments, form problem-solving teams, and establish baseline measures and evaluation methods and criteria. Approximately 120 days after conclusion of the test, evaluations of the test will be conducted and final results will be made available to the public upon request.

Dated: August 29, 1996.

SAMUEL H. BANKS,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, September 5, 1996 (61 FR 46902)]

QUOTA CATEGORIES FROM HONG KONG BEING MONITORED FOR TRANSSHIPMENT CONCERNS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document notifies the public that for the period commencing on September 1, 1996, and through September 30, 1996, certain textile quota categories from Hong Kong will be placed on a "watch list" and monitored by Customs because of transshipment concerns. If the monitoring indicates the probability of trans-shipment during that 30-day monitoring period, Customs will impose additional entry requirements on importers to address the problem.

FOR FURTHER INFORMATION CONTACT: Richard Crichton, Office of Strategic Trade (202) 927–0162

SUPPLEMENTARY INFORMATION:

BACKGROUND

Merchandise that is the product of a country to which restraint levels (quotas) or textile visa requirements apply may be entered, or attempted to be entered, with a false declaration of country of origin. The false claim that the merchandise is the product of a country other than the actual country of origin may result in the entered merchandise not being subjected to any quota level/visa requirement or being subject to a more lenient quota level/visa requirement. The entry of textiles and textile products into the commerce of the United States under such circumstances violates the bilateral and multilateral textile agreements to which the United States is a party, and causes significant injury to domestic producers of textiles and textile products, thereby compromising orderly international trade in textiles and textile products.

Customs has reason to believe that merchandise in categories 331 (cotton gloves), 338/339 (cotton knit shirts), 348 (women's cotton

pants), and 350 (cotton nightwear), may be falsely claimed as country of origin Hong Kong. Effective September 1, 1996, and through September 30, 1996, entries of goods falling under these quota categories will be monitored by Customs to determine if transshipment may be occurring. If the 30-day monitoring period points to the probability of transshipment, Customs will take the following actions: 1) require the importer to file a single entry bond for all merchandise imported into the United States under the listed categories that are claimed to be of Hong Kong origin; 2) require original signatures by factories/subcontractors on textile declarations filed by the importer; and 3) require the importer to certify that the textile declarations are accurate.

Dated: August 26, 1996.

GEORGE HEAVEY,
(for Edward F. Kwas, Assistant Commissioner,
Office of Strategic Trade.)

[Published in the Federal Register, August 29, 1996 (61 FR 45473)]

ANNOUNCEMENT OF NATIONAL CUSTOMS AUTOMATION PROGRAM TEST REGARDING PRESENTATION OF ELECTRONIC CARGO DECLARATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces a Customs plan to conduct a test program to allow the electronic submission of certain inward vessel manifest information. This notice invites public comments concerning any aspect of the test, informs interested members of the public of the eligibility requirements for voluntary participation in the test, and describes the requirements required to be met in order to participate in the test.

EFFECTIVE DATE: The test will commence no sooner than December 9, 1996, and will run for approximately one year. Comments concerning the eligibility standards, selection criteria, or information submission requirements must be received on or before October 10, 1996. To participate in the test, the necessary information as outlined in this notice must be filed with Customs on or before October 10, 1996.

ADDRESSES: Written comments regarding this notice and letters requesting participation in the test program should be addressed to Cargo Control and Entry, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 1328, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

For operational or policy matters: William Scopa (202) 927–3112.
For systems or automation matters: Kim Santos (202) 927–0651.
For legal matters: Larry L. Burton (202) 482–7040.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title VI of the North American Free Trade Agreement Implementation Act (the Act), Public Law 103–182, 107 Stat. 2057 (December 8, 1993), contains provisions which pertain to Customs Modernization (107 Stat. 2170). Subtitle B of title VI establishes the National Customs Automation Program (NCAP), an automated and electronic system for the processing of commercial importations. Section 631 of the Act created sections 411 through 414 of the Tariff Act of 1930 (19 U.S.C. 1411 through 1414), which define and list the existing and planned components of the NCAP (section 411), promulgate program goals (section 412), provide for the implementation and evaluation of the program (section 413), and provide for the remote location filing of entries (section 414). Actual testing procedures for both existing and planned components were established by the publication of Treasury Decision 95–21 in the Federal Register of March 16, 1995 (60 FR 14211), which appear as section 101.9, Customs Regulations (19 CFR 101.9).

I. *Description of Proposed Test:*

The Concept of Electronically Filing the Cargo Declaration:

The filing of the Customs Form 1302 Cargo Declaration electronically allows an importing carrier to transmit one cargo declaration to all Customs ports for review and for enforcement purposes. It also allows for the electronic release of cargo to carriers and other participating parties, as well as facilitating the process of many other Customs regulatory requirements related to the control and processing of cargo. For many years now, Customs has been accepting electronic cargo data from importing carriers, while simultaneously requiring the same information to be submitted on the Customs Form 1302 (Cargo Declaration). This test program will eliminate the requirement for participating Automated Manifest System (AMS) vessel carriers who qualify for the test to submit a Customs Form 1302 Cargo Declaration to Customs, so long as they remain proficient in meeting the electronic standards established by Customs.

Since August of 1995, Customs has been working in partnership with the trade through the Customs Electronic Systems Advisory Committee (CESAC) and other parties in developing the standards for this test program as well as identifying necessary enhancements to the AMS. Although electronic cargo data has been received by Customs from importing carriers for many years, there were many technical omissions in the AMS system which made the paper collection of cargo information more useful for enforcement and control purposes. Customs is now confident that the standards developed and enhancements being made to the AMS will make it possible to eliminate the need to submit the Customs Form 1302 simultaneously with the transmission of the cargo data electronically, and hopes to verify this through the test program. Since many importing carriers have been transmitting the

cargo data to Customs nationally for many years now, the test will run nationally.

Description of the Test:

Customs objectives are:

(1) To work with the trade community, other agencies, and other parties impacted by this program in the design, implementation and evaluation of the test; and,

(2) To use the experience gained by the test in designing operational procedures, automated systems, and regulations that are supportive of and compatible with the Customs Reorganization, the ongoing effort to improve the Trade Compliance Process, and the Automated Commercial System Redesign (ACE).

All procedures and processes will be closely coordinated with all participating and affected parties. The intent of this program is to test such operational issues as communication, cargo movement and release, as well as whether participants can meet the requirements of transmitting timely, complete and accurate cargo data.

Regulatory Provisions Suspended:

Provisions in sections 4.7 and 4.7a of the Customs Regulations (19 CFR 4.7 and 4.7a), relating to the presentation of a cargo declaration with a vessel manifest, will be suspended during this test. Participants will not be required to submit a Customs Form 1302 to Customs or have a copy on board a vessel, including the "dock copy" or the "traveler", but must be able to download or otherwise produce required information for Customs, or Coast Guard officers who may board. Participants will not be required by Customs to provide a paper Customs Form 1302 as an additional copy. There is no suspension of the requirements contained in the cited regulatory provisions to submit the other forms to be presented with a vessel manifest, such as the Customs Forms 1300 and 1301.

II. *Eligibility Criteria:*

Participation in this testing will not be considered confidential information, and the identity of participants will be made available to the public upon written request. In order to qualify for participation in the test program it will be necessary that a party either be a qualified Automated Manifest System (AMS) carrier, or that a qualified AMS Service Center(s) be designated to submit required information to Customs. In order to be considered AMS-qualified, vessel operators and other entities must have been tested by Customs and determined to possess full technical capability to transmit and receive all types of AMS data. Customs authorizes Automated Manifest System (AMS) service centers to assist carriers in the submission of required electronic information. Such AMS centers may include Port Authorities and other interested parties who act on behalf of carriers who either cannot or choose not to develop the required electronic capabilities for direct participation. Service centers are selected by Customs only if they demon-

strate that they possess the full technical capacity and necessary facilities to receive and transmit data for requesting carriers. If these conditions are met, such entities are officially recognized as "Designated Service Centers." Any participating carrier that is using a Designated Service Center is reminded that the carrier is responsible for all electronic submission requirements incorporated in the test. User requirements for qualifying carriers will be governed by those published in the handbook entitled "Customs Automated Manifest Interface Requirements-Intermodal" (CAMIR). A list of Designated Service Centers can be obtained from the U.S. Customs Service, Office of Information Technology, 1301 Constitution Avenue, NW, Washington D.C., 20229. All test participants, whether participating directly or through the services of a Designated Service Center or Centers, must submit required information electronically in all ports in which business is conducted. Electronic submissions will be required for all cargo and/or vessel types, including containerized, bulk, and break-bulk.

In order to qualify for participation in the program, an applicant is subject to and must have the electronic capabilities to meet additional requirements and conditions as follows:

1. Except as further specified in this paragraph, any carrier participating in this test program must electronically transmit complete cargo declaration information to Customs no less than 48 hours prior to actual arrival of a vessel in a port of the United States. Such transmissions will be considered certified for manifesting purposes at 48 hours prior to actual vessel arrival. For voyages from the last foreign port of departure of less than 48 hours duration, the complete cargo declaration must be transmitted no later than the actual time of vessel arrival in a United States port. Such transmissions will be considered certified for manifesting purposes at time of vessel arrival. The presentation of complete and accurate cargo information is essential to Customs enforcement mission. Therefore, each time a participating carrier fails to transmit complete and accurate cargo declaration information in a timely manner, the port director may require the presentation of the paper Customs Form 1302 for the relevant voyage. All test participants are required to transmit into AMS the actual time and date of vessel arrival in a United States port.

In any instance where a participant whose vessel is on a voyage of longer than 48 hours duration fails to transmit the necessary electronic cargo data at or before 48 hours before a vessel arrival, the port director retains the discretion to delay the unlading of the vessel. Unlading may also be delayed with respect to those voyages of less than 48 hours in duration if the port director requires additional time to review the data transmitted. Alternatively, with respect to all participants, the port director may allow the unlading to proceed but require the cargoes to be maintained and controlled by the test participant at the place of unlading in a manner as directed. In no instance, unless otherwise notified by the port director, shall cargo be removed from the place of unlading

until the cargo declaration transmission has been received by Customs, an entry has been filed, and the carrier receives electronic releases for the cargo or electronic authorizations from Customs to transfer the cargo.

2. The electronic cargo declaration information submitted under this program at the first port of arrival in the United States must list all foreign cargo on board the vessel, regardless of the intended port of discharge. In addition to the current inventory of AMS data elements, participants using CAMIR and ANSI ASCX12 standards will be required to transmit the five following new data elements:

- o Place of Receipt of Cargo;
- o Container Dimensional Data: Height, Width, Length, equipment type;
- o Container Seal Number;
- o Type of Container Movement (e.g., House-to-House, Container Station-to-Container Station, etc.);
- o Remaining on Board Indicator.

For AMS participants using the CAMIR format, the above data elements must be provided as follows:

Place of Receipt: B02 record, columns 16–32;
Remaining on Board: B01 record, column 48;
Container Information: C01 record, Length (columns 50–54), Height (columns 55–62), Width (columns 63–70), Type (columns 71–74 ISO Code);
Container Seal Number: C01 record, columns 18–32 (Seal 1), columns 33–47 (Seal 2);
Type of Container Move: C01 record, columns 76–77.

System participants should refer to the CAMIR handbook issued in August of 1995 for detailed record layouts and additional instructions.

For participants using the American National Standards Institute, Accredited Standards Committee X12 (ANSI, ASC X12) formats, the data should be sent as follows:

Place of Receipt: M11 segment, data element M1110;
Remain on Board: M11 segment, data element M1109;
Container Information: VID segment, Length = DE VID06, Height = DE VID07, Width = DE VID08, Type = DE VID09 ISO Code;
Container Seal Numbers: VID segment, Seal 1 = DE VID04, Seal 2 = DE VID05;
Type of Cont. Service Code: VID segment, DE = VID11.

Also, it is required that the following data elements be included in electronic transmissions under this test:

- Foreign port of lading;
- Place of receipt by the carrier of all cargoes. This means the first place the participating carrier took possession of the cargo, whether it be a port city or other location;
- Container number (s), length, height, width, and equipment type;
- Container seal number;
- Type of container movement (e.g., House-to-House, Container Station-to-Container Station, etc.);
- Bill of Lading number(s);
- Total quantity and unit type of merchandise in a shipment (quantity of pallets or cargo containers is not sufficient; smallest external packaging unit must be used);
- Complete shipper, consignee, and notify party names and addresses. If both notify party and consignee information is available to the participant, both shall be transmitted, including such information as "to order" or similar language if that is all that is supplied to the participant by the shipper;
- Indications of presence of hazardous materials;
- Marks and numbers, including in that data field when available:
  - Country and/or other place of origin information;
  - Consignee or other name listed;
  - Other conveyance information, such as identification of feeder vessels;
  - Purchase order, style and other identifying numbers;
- Description of merchandise. In the case of consolidated shipments, merchandise descriptions must be distinguished by quantity, weight and identifying characteristics for each shipment within a consolidated batch.

3. When a vessel is being operated under the terms of a vessel sharing or slot charter arrangement, each test participant carrier with cargo aboard the vessel is responsible for filing required information with Customs regarding their particular electronic cargo declaration . Test participant parties who provide required data to Customs electronically must do so for their portion of the cargo within the time limits established in this document.

Test participant carriers operating under a vessel sharing or slot charter arrangement shall transmit an identical vessel name and the true, accurate, and identical date and time of vessel arrival. The vessel name shall be identified with the Lloyd's Register of Ships vessel code, as submitted by the vessel owner/operator. The owner/operator of a vessel operating under a vessel sharing or slot charter arrangement shall be responsible for noting on the Customs Form 3171 (Application-Permit-Special License-Unlading-Lading-Overtime Services), each of the carriers sharing or chartering space aboard the vessel. The Customs Form 3171 shall be submitted at least 48 hours prior to a vessel's

arrival. If the participant has been granted a term permit (CF 3171), the participant shall always notify the port director at least 48 hours prior to arrival of a vessel, of any changes in parties or slot charterers as well as any other changes made after the granting of the term permit. This should be accomplished by submitting an amended copy of the original term permit.

4. Beginning with records created as of the date of first participation by a carrier and continuing for a period of 6 months after the actual date of arrival of a particular shipment, participants must maintain for immediate examination by Customs upon demand, all electronic or paper records kept in the normal course of business which relate to any particular bill of lading. After 6 months from the date of arrival, unless in an unreconciled status, any such records must be produced for examination by Customs within 5 business days following any demand for their production. Records of any bill of lading which remains in an unreconciled status must always be available for immediate examination by Customs.

Electronically maintained records may be furnished to Customs either in the form of a computer-generated report, or in screen prints of relevant electronic data. Regardless of presentation form, submissions must clearly identify, for each shipment, the vessel name and voyage number, date of arrival, port of discharge, bill of lading and container number (s), total quantity of goods, full identity of shipper and consignee, and all bill of lading transactions posted against a bill during the period when the party was responsible for the proper safekeeping and delivery of the merchandise.

5. Test participants shall not remove merchandise from Customs custody until the cargo declaration transmission has been received by Customs, an entry has been filed, and an electronic release notice has been received from Customs. Removing merchandise without proper electronic notice from Customs will subject a participant to full penalty liability and no such penalty will be mitigated to less than $500. This mitigation limitation does not apply in the case of any bill of lading which is in an unreconciled status at the time of the effective date of this test program.

6. Electronically reported cargo may not be transferred on a Permit-to-Transfer (PTT) unless the participating carrier has received an electronic authorization from Customs.

7. If for any reason the electronic system becomes inoperative or Customs is unable to receive electronic Customs Form 1302 information transmitted by test participants, it will be required that parties submit the paper Customs Form 1302 to Customs. The port director may require up to three copies.

If for any reason the Automated Manifest System, cargo selectivity, or other entry-related automated system is inoperative and electronic cargo release and selectivity is not possible, a Customs port director will, after a 2-hour waiting period, implement procedures to allow for

the non-electronic release of all cargo until such time as electronic systems are again operative. The port director will ensure that any of the appropriate information on entries released under these manual procedures is properly entered into the electronic system as soon as possible.

8. All empty containers aboard a vessel will be manifested for discharge at the first United States port of arrival, indicating the foreign port of loading of each container. If the vessel is proceeding coastwise, within 24 hours after time of arrival and at least two hours prior to time of arrival at the next United States port, the test participant will retransmit the empty container list indicating the empty containers remaining on board and any containers which were loaded at preceding ports which are to be discharged domestically.

All empty containers discharged are to be held at the place of unlading until the carrier transmits, in AMS, the actual list of containers discharged at the place of unlading. Upon such transmission, all empty containers shall be considered automatically released from Customs custody unless it is otherwise indicated by Customs that any or all are to be held. Since the AMS Empty Container Module does not allow electronic holds to be placed, any necessary holds will be placed through physical means. These requirements apply equally to domestic and foreign carriers.

9. In the case of Foreign Freight Remaining On Board (FROB) a vessel entering the United States and not intended for discharge in this country, test participants are required to transmit all bill of lading cargo data pertaining to such shipments at the first U.S. port of arrival. Such bills of lading shall be automatically released in AMS upon transmission of the data unless placed on hold with the test participant by Customs through electronic or other means. FROB bill of lading cargo data is subject to all of the same requirements and standards set forth in this document which apply to other bill of lading cargo data.

10. The penalties provided in law and regulations with respect to any discrepancy between the cargo described and identified to Customs and the cargo actually found to be aboard a vessel continue to remain in full force and effect during the test program.

11. The enormous reliance placed upon the vessel cargo declaration by Customs in its mission to interdict the flow of illegal narcotics into the United States cannot be overstated. Therefore, if the Director, Trade Compliance, Customs Headquarters, determines that a test participant's electronic transmissions of the cargo declaration are deficient to the extent that they compromise that mission in any manner, he may require that participant to submit a Customs Form 1302 Cargo Declaration for all or a portion of that party's vessel arrivals during the pendency of the test period. Such participant must submit the paper Customs Form 1302 in accordance with the requirements of Part 4 of the Customs Regulations (19 CFR Part 4).

Application Process:

Parties desiring to participate in this test program must submit a written statement to the United States Customs Service, Cargo Control & Entry, 1301 Constitution Avenue, NW, Room 1328, Washington, D.C. 20229–0002, on or before 30 days from publication in the Federal Register. The document, signed by an authorized official of the carrier, must state that the carrier meets all qualifications as outlined in this document and wishes to voluntarily participate in the test. The statement must acknowledge that all submissions made to Customs as part of the test are required to be accomplished electronically. The document must also designate a national point of contact and telephone number, and shall also identify local contacts and telephone numbers for the use of Customs personnel at individual ports.

Bases for Participant Selection:

Eligible importing carriers will be considered for participation in this test. Customs is looking for a variety of circumstances and participants in this test. We stress that those not selected for participation will be invited to comment on the test and to participate in its evaluation. Selection will be based on the depth of an applicant's electronic interface capabilities and the ability to meet all the user requirements in the CAMIR and in this notice. Participants selected will be notified by means of the Customs Electronic Bulletin Board.

III. *Test evaluation criteria:*

Once participants are selected, Customs will meet to review all public comments received concerning any aspect of the test program or procedures, amend procedures as necessary in light of those comments, form problem-solving teams, and establish baseline measures and evaluation methods and criteria. Six months after implementation of the program, evaluations of the program will be commenced with the final results published in the Federal Register and CUSTOMS BULLETIN as required by section 101.9(b), Customs Regulations (19 CFR 101.9(b)). The following evaluation methods and criteria have been suggested:

1. Establish baseline measurements through questionnaires to the trade and Customs port officials.

2. Use the results obtained through various Compliance Measurement programs related to vessel manifesting to determine the efficiency of electronic transmissions of the cargo data.

Preliminary choices of evaluation criteria for Customs and other government agencies include workload impact (workload shifts, cycle time, etc. * * *), policy and procedural accommodation, and trade compliance impact. Possible criteria for the trade participants are cost benefits, system efficiency, operational efficiency, and other items identified by the group.

In conclusion, it is emphasized that if a company is interested in participating in the test program, it must first be tested by Customs and become a qualified AMS carrier, or it may use a qualified AMS service

center. It is also emphasized that a participant must transmit the electronic cargo declaration for all of its arrivals in all Customs ports, for all types of cargo. Upon arrival of a vessel at its first U.S. port, an electronic cargo declaration for all cargo aboard the vessel must be transmitted, regardless of the intended port of discharge.

Dated: September 5, 1996.

SAMUEL H. BANKS,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, September 10, 1996 (61 FR 47782)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 27, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF DESK TOP LAMINATING MACHINES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat, 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of the Laminizer, which is a desk top appliance used to heat seal photos, licenses, etc., in plastic sleeves. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before October 18, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Submitted comments may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of a desk top laminating machine. Customs invites comments on the correctness of the proposed revocation.

In *NY* 865382, dated August 2, 1991, the Laminizer, a desk top, household appliance used to heat seal photos, licenses, membership cards, etc., in plastic sleeves, was held to be classifiable as electric welding machines or apparatus, in subheading 8515.80.00, Harmonized Tariff Schedule of the United States (HTSUS). This ruling was based on Customs belief that the device was described in relevant **Harmonized Commodity Description And Coding System Explanatory Notes,** for heading 85.15. *NY* 865382 is set forth as "Attachment A" to this document.

It is now Customs position that because of its size and service application, the Laminizer is not commonly known or regarded in the industry as welding apparatus. Rather, it is an office machine of heading 8472, because in its intended service application it performs office work.

Customs intends to revoke *NY* 865382 to reflect the proper classification of the Laminizer under subheading 8472.90.90, HTSUS, as other office machines. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 959287 revoking *NY* 865382 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained tor actions occurring on or after the date of publication of this notice.

Dated: August 22, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 2, 1991.

CLA–2–85:S:N:N1:105 865382
Category: Classification
Tariff No. 8515.80.0080

MR. JAMES C. ALLUDI
A. J. ARANGO, INC.
P.O. Box 3007
Tampa, FL 33601

Re: The tariff classification of a laminating machine from Taiwan.

DEAR MR. ALLUDI:

In your letter dated July 18, 1991, on behalf of Quality Sourcing Services Inc. you requested a tariff classification ruling.

The Laminizer is a household appliance used to heat seal photos licenses, membership cards, etc. in plastic sleeves. Documents to be laminated are inserted into a sleeve and then fed into the Laminizer. They exit if from it sealed.

The applicable subheading for the Laminizer will be 8515.80.0080, Harmonized Tariff Schedule of the United States (HTS), which provides for other electric welding machines and apparatus. The rate of duty will be 2 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 2, 1991.

CLA–2 RR:TC:MM 959287 JAS
Category: Classification
Tariff No. 8472.90.90

MR. JAMES C. ALLUDI
A.J. ARANGO, INC.
P.O. Box 3007
Tampa, FL 33601

Re: *NY* 865382 revoked; Laminizer, desk top laminating machine, household appliance for heat sealing small articles in plastic sleeves; office machines, heading 8472; electric welding machines and apparatus, heading 8515; C.A.D. 986; *NY* 864424, *NY* 888918.

DEAR MR. ALLUDI:

In *NY* 865382, dated August 2, 1991, the Area Director of Customs, New York Seaport, held that a laminating machine from Taiwan was classifiable as electric welding machines and apparatus, in subheading 8515.80.00, Harmonized Tariff Schedule of the United States (HTSUS). This ruling is incorrect and no longer represents the position of the Customs Service.

Facts:

The merchandise in issue is the Laminizer, an electric, household-type appliance used to heat seal articles such as photographs, recipe cards, licenses, assorted cards and paper

objects, etc., in plastic sleeves. It is generally rectangular in shape with small feet at the four corners as a base, for placement on desks or tabletops. Activating the machine causes the automatic feed motor to start and pre-heating for 2–3 minutes. The article to be sealed is placed into the plastic sleeve and the sleeve inserted, bonded edge first, into the front of the machine where it engages with the automatic feed, and comes out the back.

The provisions under consideration are as follows:

8472	Other office machines * * *:
8472.90	Other:
8472.90.90	Other * * * 2.9 percent *ad valorem*
* * * * * * *	
8515	Electric * * * brazing or welding machines and apparatus * * *:
8515.80.00	Other machines and apparatus * * * 1.2 percent *ad valorem*

Issue:

Whether the Laminizer is an office machine of heading 8472.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant **ENs** at p. 1356 describe certain machines and apparatus for welding thermoplastic materials. Among those are machines for welding with electrically heated elements (heating element welding), in which the surfaces to be joined are warmed by means of electrically heated elements and joined under pressure with or without additives. These notes appear to describe the Laminizer. However, we have reevaluated the available information and determined that because of its size and the environment in which used, the Laminizer is not commonly known as or regarded in the industry as a welding machine. It is a desktop machine, one advertised in submitted literature for use in the household. In reaching this conclusion to exclude the Laminizer from heading 8515, we note that tariff terms do not include everything within their literal meaning, *United States v. Andrew Fisher Cycle, Inc.*, 57 CCPA 102, CAD. 986 (1970).

Other **ENs** at pp. 1302 and 1302a state, in relevant part, that heading 84.72 covers all office machines not provided for more specifically in the HTS. The term "office machines" is to be taken in a wide general sense to include all machines used in offices, shops, factories, workshops, schools, railway stations, hotels, etc., for doing "office work" (work concerning the writing, recording, sorting, filing, etc., of correspondence, documents, forms, records, accounts, etc.). Office machines of heading 84.72 must have a base for fixing or for placing on a table or desk. It is our opinion that the Laminizer does office work for tariff purposes. It is an office machine of heading 8472. *NY* 864424, dated July 2, 1991, and *NY* 888918, dated August 6, 1993, classified similar laminating machines in subheading 8472.80.00, HTSUS.

Holding:

Under the authority of GRI 1, the Laminizer is provided for in heading 8472. It is classifiable in subheading 8472.90.90, HTSUS. *NY* 865382, dated August 2, 1991, is revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF HOUSEHOLD-TYPE CLOTHES HANGERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of clothes hangers. These articles, designated the "Jawbreaker," are clothes hangers the top hanging portion of which is of steel, and the bottom portion of plastic. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before October 18, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Submitted comments may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of the clothes hangers, designated the "Jawbreaker," Customs invites comments on the correctness of the proposed revocation.

In *NY* 817139, dated December 29, 1995, certain plastic and steel clothes hangers were held to be classifiable as other articles of iron or steel, in subheading 7326.90.85, Harmonized Tariff Schedule of the United States (HTSUS). This ruling was based on the opinion that these were composite goods, with steel imparting the essential character. *NY* 817139 is set forth as "Attachment A" to this document.

It is now Customs position that these articles are not limited use articles used in commercial establishments. Rather, they are sturdy and

capable of continued reuse, possibly even decorative. As such, they are of a kind sold at retail for repeated use to hang/store one's personal clothes, either at home, or in a hotel or boarding house during travel.

Customs intends to revoke *NY* 817139 to reflect the proper classification of the Jawbreaker under subheading 7323.99.90, HTSUS, as other household articles, of iron or steel. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 959271 revoking *NY* 817139 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August 23, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 29, 1995.
CLA–2–73:RR:NC:GI:115 817139
Category: Classification
Tariff No. 7326.90.8585

MS. MONA WEBSTER
TARGET STORES
33 South Sixth Street
P.O. Box 1392
Minneapolis, MN 55440–1392

Re: The tariff classification of skirt and pants hangers from China.

DEAR MS. WEBSTER:

In your letter dated November 20, 1995, you requested a tariff classification ruling.

The subject items are skirt and pants hangers, style #703P. They come in a set of two. The hanging part at the top of each hanger is made of steel and the bottom part of the hanger is made of plastic. These hangers are sometimes referred to as "jawbreakers".

Your merchandise is considered composite goods, consisting of different materials or made up of different components. These items shall be classified as if it consisted of the material or component which gives it its essential character. In this instance, the steel imparts the essential character.

The applicable subheading for the hangers will be 7326.90.8585, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of iron or steel, other. The duty rate will be 4.6% *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM 959271 JAS
Category: Classification
Tariff No. 7323.99.90

MS. MONA WEBSTER
TARGET STORES
33 South Sixth Street
P.O. Box 1392
Minneapolis, MN 55440–1392

Re: *NY* 817139 revoked; jawbreaker hangers, plastic and steel clothes hangers of a kind used in the household; clothes hangers capable of tong term use; articles used in commercial establishments to transport clothes, Heading 7326, articles of iron or steel.

DEAR MS. WEBSTER:

In a letter, dated May 14, 1996, you ask that we reconsider a ruling on the tariff classification of skirt and pants hangers from China. We have reconsidered this ruling and determined that it is incorrect.

Facts:

In *NY* 817139, issued to you on December 29, 1995, the Director, National Commodity Specialist Division, New York, held skirt and pants hangers from China, designated the "Jawbreaker" style 703P, were classifiable in subheading 7326.90.85, Harmonized Tariff Schedule of the United States (HTSUS), as other articles of iron or steel. A submitted photograph depicts an 11 inch-long clothes hanger, with double hook upper portion of steel, and plastic lower portion in a jaw-like configuration. Holding the double hooks apart causes the jaws of the lower portion to separate while joining the hooks closes the jaws around skirts and pants and similar garments that hang vertically.

You maintain that these hangers, which are sold in sets of two, are of a kind sold at retail for repeated reuse in the home to hang or store clothes. As such, they are other household articles of the type provided for in HTS heading 7323.

The provisions under consideration are as follows:

7323	[o]ther household articles and parts thereof, of iron or steel
7323.99	Other:
7323.99.90	Other * * * 3.4 percent *ad valorem*
* * * * * * *	
7326	Other Articles of iron or steel:
7326.90	Other:
7326.90.05	Other * * * 4.6 percent *ad valorem*

Issue:

Whether "Jawbreaker" skirt and pants hangers are household articles.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

NY 817139 held that "Jawbreaker" skirt and pants hangers, in part of plastic and in part of steel, were articles of iron or steel of heading 7326 because the steel component imparted

the essential character to the whole. This was in accordance with GRI 3(b), HTSUS, which states, in relevant part, that composite goods consisting of different materials or made up of different components, shall be classified as if consisting of the material or component which gives them their essential character. However, no consideration was given to heading 7323, which encompasses, among other things, household articles of iron or steel.

At the four-digit heading level, relevant heading 73.23 **ENs** at p. 1035 include under (A) **TABLE, KITCHEN OR OTHER HOUSEHOLD ARTICLES AND PARTS THEREOF** a wide range of iron or steel articles, not more specifically covered by other headings in the Nomenclature, used for table, kitchen or other household purposes, and include the same goods for use in hotels, restaurants, boarding houses, hospitals, canteens, barracks, etc. Clothes-hangers are among the articles specifically listed. In this context, therefore, household-type clothes hangers would not necessarily be characterized by their use in the home but, rather, by their physical characteristics, i.e., their suitability to hang/store clothes, their sturdy construction as an indication of long-term or repeated reuse, and possibly even being decorative. These features would serve to distinguish clothes hangers of a type used to transport clothes from dry cleaners and similar commercial establishments *to* the home, hotel, restaurant, etc. Such clothes hangers would normally be of flimsy construction, and of a type that is readily discarded or recycled.

The construction of the skirt and pants hanger in issue indicates to us that it is not intended as a one-time use item. Rather, its substantial construction and the manner in which it functions suggests it is of a type intended for repeated use to hang/store one's personal clothes, either at home, or in a hotel or boarding house during travel.

Holding:

Under the authority of GRI 1, the "Jawbreaker" skirt and pants hanger, style 703P, is provided for in heading 7323. It is classifiable in subheading 7323.99.90, HTSUS. NY 817139, dated December 29, 1995, is revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, September 3, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN DURANT,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF AN INFLATABLE BALL PIT MOUNTAIN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NYRL) A81066, dated April 3, 1996, concerning the classification of an inflatable Ball Pit Mountain.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after November 18, 1996.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Ruling (202) 482–7097.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 24, 1996, Customs published in the CUSTOMS BULLETIN, Volume 30, No. 29/30, a notice of a proposal to revoke NYRL A81066, dated April 3, 1996, which held that certain merchandise referred to as an inflatable Ball Pit Mountain was classified as other articles of plastics and articles of other material of headings 3901 to 3914: Pneumatic mattresses and other inflatable articles, not elsewhere specified or included, in subheading 3926.90.7500, Harmonized Tariff Schedule of

the United States (HTSUS) with duty at the general rate of 4.2 percent *ad valorem*. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057, this notice advises interested parties that Customs is revoking NYRL A81066 to reflect the proper classification of the Ball Pit Mountain in subheading 9503.90,0030, HTSUS, as other toys (except models), not having a spring mechanism, free of duty. Headquarters Ruling Letter revoking NYRL A81066, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 27, 1996.

JOHN ELKINS,
(for John Durant Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 27, 1996.

CLA–2 RR:TC:FC 959196K
Category: Classification
Tariff No. 9503.90.0030

LAWRENCE P. PILON, ESQ.
HODES & PILON
33 North Dearborn Street
Suite 2204
Chicago, IL 60602–3109

Re: Tariff classification of inflatable Ball Pit Mountain; revocation of New York Ruling Letter (NYRL) A81066.

DEAR SIR:

In response to your letter of March 4, 1996, on behalf of Hedstrom Corporation, the Customs Service issued NYRL A81066, dated April 3, 1996, which held that certain merchandise referred to as an inflatable Ball Pit Mountain was classified as other articles of plastics and articles of other material of headings 3901 to 3914: Pneumatic mattresses and other inflatable articles, not elsewhere specified or included, in subheading 3926.90.7500, Harmonized Tariff Schedule of the United States (HTSUS), with duty at the general rate of 4.2 percent *ad valorem*. In your letter of April 30, 1996, you opined that the merchandise is classified under the provision for other toys, (except models), not having a spring mechanism, in subheading 9503.90.0030, HTSUS, free of duty and requested that we reconsider, modify, or revoke the ruling. This letter is to inform you that NYRL A81066 no longer reflects the views of the Customs Service and is revoked in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of

the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), hereinafter, section 625), notice of the proposed revocation of NYRL A81066 was published on July 24, 1996, in the CUSTOMS BULLETIN, in Volume 30, No. 29/30. The following represents our position.

Facts:

The merchandise, referred to as the Ball Pit Mountain, model number 8–651, is made of heavy-duty vinyl which, when inflated, creates a hollow cone shape mountain. In the center of each of the four sides is an opening large enough for a young child to climb into and out of the article. The top of the cone shaped mountain is also opened and along with the other four openings, the inside of the article is exposed to the elements. There is no means to close the openings and there are no pegs or poles involved with the article. A sample was not submitted but a brochure was submitted. The dimensions were not provided. The brochure states that the article can accommodate up to 4 children ages two and up and it is big enough for adults. After importation, the Ball Pit Mountain is packaged with 200 multicolored 3" hollow plastic balls. The balls are intended to be inserted on the floor of the article.

Issue:

The issue is whether the article as described above is a tent, or a toy for classification purposes.

Law and Analysis:

Subheading 9503.90.0030, HTSUS, provides for other toys (except models), not having a spring mechanism. Note 1.(u), Chapter 95, HTSUS, states, that the chapter does not cover "racket strings, teats or other camping goods, or gloves (classified according to their constituent material)." Accordingly, if the article meets the definition of "tents or other camping goods" it cannot be classified as a toy.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. Heading 6306 provides for tents of various materials. The EN for heading 6306, define the term "tents" as follows:

> Tents are shelters made of lightweight to fairly heavy fabrics of man-made fibres, cotton or blended textile materials, whether or not coated, covered or laminated, or of canvas. They usually have a single or double roof and sides or walls (single or double), which permit the formation of an enclosure. The heading covers tents of various sizes and shapes, e.g., marquees and tents for military, camping including backpack tents), circus, beach use. They are classified in this heading, whether or not they are presented complete with their tent poles, tent pegs, guy ropes or other accessories.

The term "tent" is defined in Websters Third New International Dictionary (1968) as "a collapsible shelter of canvas or other material stretched and sustained by poles, usu. made fast by ropes attached to pegs hammered into the ground, and used for camping outdoors (as by soldiers or vacationers) or as a temporary building."

The issue of tents versus toys was discussed in Headquarters Ruling Letters (HRL), 088644 dated June 11, 1991, 954239 dated September 14, 1993, 956974 dated November 23, 1994, and 937639 dated May 31, 1995. When these decisions are considered together, they offer useful guidelines in determining when articles in the form of "toy tents" are classified as tents or as toys for tariff purposes.

In HRL 088644, a Playskool Adventure Tent was made of nylon fabric, containing a mesh doorway secured at the bottom by a hook-and-loop fastener, and a mesh window with a flap. After importation, the poles and periscope were packaged with the tent. The poles were used to erect the tent and the periscope with a dome cap was attached to the top opening of the tent. We held that the article as imported was a tent.

In HRL 956974, a Ball Pit tent was made of nylon mesh and textile with a dome-shaped enclosure and with a plastic zippered opening in the front, and two nylon mesh side panels. The article was erected with poles and was imported with 500 multi-colored plastic balls. Based on 3(b) of the General Rules of Interpretation (GRI), HTSUS, we held that the article was a toy. However, we noted in the decision, that if the article was imported without the plastic balls, the article would be classified as a tent under the principle of GRI 1.

In HRL 957639, a Ball Barrel made of textile contained a steel spiral coil to form a barrel or tunnel-like article with zippered openings at each of end of the barrel. The article was designed to roll on the ground and was collapsible for storage. After importation, the article

was packaged with multi-colored plastic balls for retail sale. We held that the barrel-like article, imported without the balls, was a toy, not a tent.

In HRL 954239, a play bed tent had a roof, two mesh openings and plastic poles to form the shape of a tent. The tent was designed to be attached to the bottom portion to a mattress of a bed in the same manner as a fitted sheet. We held that the article was a toy, not a tent.

In HRLs 088644 and 956974 (if imported without the 500 plastic balls), the articles, although designed for young children, met the definitions for tents. The tents contained a roof, side walls which permit the formation of an enclosure, and poles were used to form the shape. The tents were shelters for outdoor use and capable of protecting the users from the elements. In this case the cone shaped inflatable Ball Pit Mountain has no roof. The opening at the top along with the four side openings expose the interior to the elements. There is no means to close the openings and poles are not used to shape an enclosure. The article cannot be used as a shelter. Accordingly, the inflatable Ball Pit Mountain is not a tent and it is not excluded from classification in subheading 9503.90.0030, HTSUS, by Note 1.(u).

Holding:

The inflatable Ball Pit Mountain, as described above, is classified in subheading 9503.90.0030, HTSUS.

NYRL A81066 dated April 3, 1996, is revoked.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE COUNTRY OF ORIGIN OF COMFORTERS, QUILTED BEDSPREADS AND BED LINENS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a country of origin ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to, *inter alia,* the country of origin of comforters, quitted bedspreads and bedding sets.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after November 18, 1996.

FOR FURTHER INFORMATION CONTACT: Nancy Plumer, Textile Branch, (202) 482–7089.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 24, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 29/30, proposing to modify New York Ruling

Letter (NYRL) 818218, dated February 10, 1996, wherein Customs dealt with the tariff classification and country of origin of comforters, quitted bedspreads and bedding sets. No comments were received in response to this notice.

NYRL 818218 determined that under the Customs Regulations effective July 1, 1996, (19 CFR 102.21) that implement section 334 of the Uruguay Round Agreements Act (codified at 19 U.S.C. Section 3592), the country of origin for all the subject items was Pakistan. This office has reviewed the country of origin determinations in NYRL 818218 and it is our opinion that some of the determinations set forth are incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL 818218 to reflect the proper country of origin determination for the subject items pursuant to 19 CFR Section 102.21. Specifically, the country of origin will be determined by application of Section 102.21(c)(2), Section 102.21(e), Section 102.21(c)(4) and (c)(5). Based on our analysis, the country of origin for some of the articles at issue in NYRL 818218 is no longer considered to be Pakistan. Headquarters Ruling Letter (HRL) 959304 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 3, 1996.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 3, 1996.

CLA–2 RR:CC:TE 959304 NLP
Category: Classification

MR. WILLIAM J. LECLAIR
TRANS-BORDER CUSTOMS SERVICES, INC.
One Trans-Border Drive
P.O. Box 800
Champlain, NY 12919

Re: Modification of NYRL, 818218; country of origin determination for comforters, quilted spreads, pillow shams, sheets, pillow cases and bed skirts; 19 CFR 102.21(c)(2), (4) and (5); 102.21(d).

DEAR MR. LECLAIR:

On February 10, 1996, our New York office issued to you, on behalf of Lawrence Home Fashions, Inc., New York Ruling Letter (NYRL) 818218, which dealt with the classification and country of origin of comforters, bedspreads and bedding sets imported from Canada. After reviewing this ruling, we have determined that the country of origin determination set forth for some of these items is incorrect and this ruling modifies those determinations. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. No. 103–182, 107 Stat. 2057 (1993)) (hereinafter, section 625), notice of the proposed modification of NYRL 818218 was published July 24, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 29/30. No comments were received in response to the notice.

Facts:

The articles at issue are a comforter, a quilted bedspread and three bedding sets. We will describe each of the items and their respective manufacturing operations.

Item #1—Comforter:

The comforter is comprised of a 50% polyester and 50% cotton outer shell fabric and batting material made of 100% polyester nonwoven fiberfill fabric. The manufacturing operations are as follows:

Pakistan

50% polyester/50% cotton fabric for the outer shell is sourced

Canada

fabric for the batting is sourced
fabric for the outer shell is bleached, dyed, printed, cut and sewn
comforter is stuffed, quilted and assembled
6 millimeter piping is inserted in the edge seam on all four sides

Item #2—Quilted Bedspread:

The top surface is made from a 50% polyester and 50% cotton fabric and a batting material made of 100% polyester nonwoven fiberfill fabric. The comforter's backing fabric is a plain white 50% polyester/50% cotton lightweight muslin type fabric. The bedspread has been quilt stitched through all three layers.

Pakistan

fabric for the top surface of the bedspread is sourced

Canada

fabric for the batting is sourced
fabric for the backing is sourced
fabric for the top surface is bleached, dyed, printed, cut and sewn
bedspread is assembled

Item #3—Bedding Set:

This item consists of a comforter, pillow sham and bed skirt. As stated in NYRL 818218, this set meets the requirements for "goods put up in sets for retail sale" pursuant to GRI 3(b). The essential character is imparted by the comforter.

Comforter: the top surface is made of a 50% polyester and 50% cotton fabric. It is stuffed with a batting material made of 100% polyester nonwoven fiberfill fabric. The comforter's backing material is a plain white 50% polyester/50% cotton lightweight muslin type fabric.

Pakistan

fabric for the top surface of the comforter is sourced

Canada

fabric for the batting is sourced
fabric for the comforter's backing is sourced
fabric for the top surface is bleached, dyed, printed, cut and sewn
comforter is stuffed and assembled

Sham: is made of a 50% polyester and 50% cotton fabric.

Pakistan

fabric is sourced

Canada
fabric is bleached, dyed, printed, cut and sewn
sham is assembled

Bed skirt: The skirt component is made of a 50% polyester and 50% cotton fabric. The platform portion is made of a man-made nonwoven fabric.

Pakistan
fabric for the skirt component is sourced

Canada
fabric for the skirt component is bleached, dyed, printed, cut and sewn
fabric for the platform portion is sourced
bed skirt is assembled

Item #4—Bedding Set:

This item consists of a comforter and sheet set. As stated in NYRL 818218, this set meets the requirements for "goods put up in sets for retail sale" pursuant to GRI 3(b). The essential character is imparted by the comforter.

Comforter: the outer shell of the comforter is made of a 50% polyester and 50% cotton fabric and is stuffed with a batting material made of 100% polyester nonwoven fiberfill fabric.

Pakistan
fabric for the outer shell is sourced

Canada
fabric for the batting is sourced
fabric for the outer shell is bleached, dyed, printed, cut and sewn
comforter is stuffed, quilted and assembled

Sheets and pillowcases: are made of a 50% polyester and 50% cotton fabric. The fitted sheet is fully elasticized and cut and hemmed on all four sides. The flat sheet contains one salvage edge and is hemmed on all four sides.

Pakistan
fabric is sourced

Canada
fabric is bleached, dyed, printed, out and sewn
sheets and pillowcases are assembled

Item #5—Bedding Set:

This item is a bed in a bag set consisting of: a comforter, a flat sheet, a fitted sheet, two pillow cases, two pillow shams and a bed skirt. As stated in NYRL 818218, this set meets the requirements for "goods put up in sets for retail sale" pursuant to GRI 3(b). The essential character is imparted by the comforter.

Comforter: the top surface of the comforter is made of a 50% polyester and 50% cotton fabric and it is stuffed with a batting material made of 100% polyester nonwoven fiberfill fabric. The comforter's backing fabric is made from a plain white 50% polyester/50% cotton lightweight muslin type fabric.

Pakistan
fabric for the top surface is sourced

Canada
fabric for the batting is sourced
fabric for the comforter's backing is sourced
fabric for the top surface is bleached, dyed, printed, cut and sewn
comforter is stuffed and assembled

Sheets and pillowcases: are made of a 50% polyester and 50% cotton fabric.

Pakistan
fabric is sourced

Canada
fabric is bleached, dyed, printed, cut and sewn
sheets and pillowcases are assembled

Sham: is made of the 50% polyester and 50% cotton fabric

Pakistan
fabric is sourced

Canada
fabric is bleached, dyed, printed, cut and sewn
sham is assembled

Bed Skirt: the skirt component is made of a 50% polyester and 50% cotton fabric. The platform component is made from a nonwoven fabric.

Pakistan
fabric for the skirt is sourced

Canada
fabric for the platform is sourced
fabric for the skirt is bleached, dyed, printed, cut and sewn
bed skirt is assembled

Issue:

What is the country of origin of the subject merchandise?

Law and Analysis:

Pursuant to the Uruguay Round Agreements Act, new rules of origin will be effective for textile products entered, or withdrawn from warehouse for consumption, on or after July 1, 1996. These rules were published in the Federal Register, 60 Fed. Reg. 46188 (September 5, 1995). Section 102.21, Customs Regulations (19 CFR Section 102.21), sets forth the general rules which determine country of origin. The country of origin of a textile product will be determined by a hierarchy of rules set forth in paragraphs (c)(1) through (c)(5) of Section 102.21.

Section 102.21(c)(1) sets forth the general rule for determining the country of origin of a textile product in which the good is wholly obtained or produced in a single country, territory, or insular possession. It states the following: "The country of a textile or apparel product is the single, country, territory, or insular possession in which the good was wholly obtained or produced." As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Section 102.21(c)(2) provides for instances where the country of origin of a textile product cannot be determined under Section 102.21(c)(1). Section 102.21(c)(2) provides the following:

> Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section.

Paragraph (e) states that "The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section." Two provisions are applicable in this instance, to wit:

6301–6306	The country of origin of a good classifiable under heading 6301 through 6306 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.
9404.90	The country of origin of a good classifiable under subheading 9404.90 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.

The subject merchandise consists of a comforter, a quilted bedspread and three bedding sets. In NYRL 818218, Customs determined that the comforter was classified in subheading 9404.90.8322, Harmonized Tariff Schedule of the United States (HTSUS) and the quilted bedspread was classified in subheading 9404.90.9555, HTSUS. NYRL 818218 also held that the bedding sets met the qualifications of "goods put up in sets for retail sale" and that the comforters imparted the essential character in all three sets. As such, the proper classification for these items was in subheading 9404.90.8522, HTSUS.

Section 102.21(d) addresses the treatment of sets for country of origin purposes. Section 102.21(d) provides the following:

> Where a good classifiable in the HTSUS as a set includes one or more components that are textile or apparel products and a single country of origin for all of the components of the set cannot be determined under paragraph (c) this section, the country of origin of each component of the set that is a textile or apparel product shall be determined separately under paragraph (c) this section.

Although the classification of the three bedding sets (described herein as items #3, #4, and #5), as per an essential character determination, is based on the comforter, as per the terms of Section 102.21(d), the country of origin of each of the items comprising the sets must be determined separately.

As the comforter, in the bedding sets and the comforter and quilted spread imported alone are comprised of either two or three fabrics sourced in two countries, there is no single country in which the fabric was formed. Accordingly, Section 102.21 (c)(2) is not applicable to this merchandise.

However, the tariff shift rule may be applicable in determining the country of origin of some of the components of the sets. The sheets and pillowcases are classifiable in heading 6302, Harmonized Tariff Schedule of the United States (HTSUS). The pillow shams and bed skirts are classifiable in heading 6304, HTSUS. As the fabric comprising the pillow shams, the sheets and pillowcases was formed by a fabric making process in a single country, that is, Pakistan the country of origin for these articles is Pakistan. However, as the fabric for the bed skirt is formed in two countries, the tariff shift rule is not applicable to that merchandise.

Section 102.21(c)(3) states that "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section:

> (i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or
> (ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

As the comforters, the quilted bedspread and the bed skirts are not knit to shape and heading 6304, HTSUS, and subheading 9404.90, HTSUS, are both excepted from provision (ii), Section 102.21(c)(3) is inapplicable.

Section 102.21(c)(4) provides:

> Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory, or insular possession in which the most important assembly or manufacturing process occurred.

In the case of the comforter, in items #1 and #4, the fabric making process of the comforters' outer shells constitutes the most important manufacturing process. It is the outer shell which actually forms the merchandise. Moreover, basing the country of origin determination on the fabric making process as opposed to the assembly process carries out the clear intent of Section 334 as expressed in Section 334(b)(2) and Part 102.21(c)(3)(ii). Accordingly, the fabric making process in Pakistan, where the fabric for the comforters outer shells is formed, constitutes the most important manufacturing process. Therefore, the country of origin for these comforters is Pakistan.

In the case of the quilted bedspread, the comforters and bed skirts in items #2, #3 and #5, the most important manufacturing process occurs at the time of the fabric making. As the fabric for these articles is sourced in more than one country, and no one fabric is more important than the other, the country of origin cannot be readily determined based on the fabric making process. As such, paragraph (c)(4) is not applicable to this merchandise.

Section 102.21(c)(5) states the following:

> Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2), (3) or (4) of this section, the country of origin of the good is the last country, territory, or insular possession in which an important assembly or manufacturing process occurred.

Accordingly, in the case of the quilted bedspread, the comforters and bed skirts in items #2, #3 and #5, the country of origin is conferred by the last country in which an important assembly or manufacturing process occurred, that is, Canada.

Holding:

The country of origin for the pillow shams in items #3 and #5 and the sheets and pillow cases in items #4 and #5 is Pakistan and requires a visa from Pakistan.

The country of origin for the comforters in items #1 and #4 is Pakistan and requires a visa from Pakistan.

The country of origin for the quilted bedspread, the comforters and bed skirts in items #2, #3 and #5 is Canada.

Pursuant to the analysis and holding of this ruling, NYRL 812818 is modified accordingly.

The holding set forth above applies only to the specific factual situation and merchandise identified in the ruling request. This position is clearly set forth in 19 CFR 177.9(b)(1). This sections states that a ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect.

Should it be subsequently determined that the information furnished is not complete and does not comply with 19 CFR 177.9(b)(1), the ruling will be subject to modification or revocation. In the event there is a change in the facts previously furnished, this may affect the determination of country of origin. Accordingly, if there is any change in the facts submitted to Customs, it is recommended that a new ruling request be submitted in accordance with 19 CFR 177.2.

In accordance with section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF RULING LETTER RELATING TO THE COUNTRY OF ORIGIN MARKING OF IMPORTED GOLF CLUB SETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of country of origin marking ruling letter,

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement ("NAFTA") Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993), this notice advises interested parties that Customs is modifying a ruling issued pursuant to 19 CFR Part 181 regarding a country of origin determination under 19 CFR Part 102 (NAFTA "Marking Rules") for imported golf club sets. Notice of the proposed modification was published on July 24, 1996, in the CUSTOMS BULLETIN, volume 30, Number 29/30.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn for warehouse for consumption October 18, 1996.

FOR FURTHER INFORMATION CONTACT: Anthony Tonucci, Special Classification and Marking Branch, (202–482–7073).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 24, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 29/30, proposing to modify a New York ruling

letter (NY) 810816, issued June 1, 1995, which held that pursuant to section 102.14, interim Regulations (19 CFR 102.14), the country of origin of imported golf club sets assembled in Canada from U.S. origin stainless steel heads and rubber grips and Japanese origin stainless steel shafts is Canada, and thus marking the outside carton with the words "Assembled in Canada" was an acceptable country of origin marking for the imported golf club sets. No comments were received in response to this notice. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement ("NAFTA") Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993), this notice advises interested parties that Customs is modifying NY 810816 to reflect that pursuant to section 102.11(d)(2)(i), Customs Regulations (102.11(d)(2)(1)), the country of origin of the imported golf club sets is "Canada", rather than pursuant to section 102.14, as erroneously held in NY 810816. It remains Customs position that the imported golf club sets are of Canadian origin and marking their retail container "Assembled in Canada" is an acceptable country of origin marking for the imported golf club sets. NY 810816 is set forth in "Attachment A". Headquarter's Ruling Letter 559431 modifying NY 810816 is set forth in Attachment B to this document.

Dated: September 3, 1996.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 3, 1996.

Mar–2 RR:TC:SM 559431 AT
Category: Marking

MR. DANIEL MURPHY
OPERATIONS MANAGER
DIMARCO GOLF
4500 Dixie Rd., Unit 12 A
Mississauga, CA L4W1V7

Re: Modification of NY 810816 concerning country of origin marking requirements of imported golf clubs assembled in Canada from U.S. and Japanese origin components; Article 509; NAFTA Marking Rules; section 102.11 of the interim regulations.

DEAR MR. MURPHY:

This letter is to inform you that Customs is reconsidering your original submission dated May 16, 1996, submitted to the National Import Specialist, New York Office, requesting a ruling concerning the country of origin marking requirements for imported golf clubs which are assembled in Canada from U.S. and Japanese components.

Facts:

According to your May 16, 1996 submission, DiMarco Golf imports golf clubs into the U.S. which are assembled in Canada from U.S. and Japanese components. You state that all of the components (stainless steel heads, rubber golf club grips, ferrules and two sided grip tape) are of U.S. origin, except the stainless steel shafts which are of Japanese origin. These components are assembled in Canada into 8 piece golf club sets consisting of 7 irons (3, 4, 5, 6, 7, 8, and 9) and a pitching wedge. You submit that the assembly operation performed in Canada to make the golf clubs consists of the following steps:

1. Cutting the stainless steel shaft.
2. Applying the ferrule to the shaft.
3. Epoxying the head to the shaft.
4. Applying the grip to the shaft.
5. Packaging the golf club sets ready for shipment.
6. Marking the carton "Assembled in Canada".

You inquired as to whether marking the outside carton in which the golf club sets were packaged with the words "Assembled in Canada" would be an acceptable country of origin marking for the imported golf club sets. In NY 810816 dated June 1, 1995, our New York office ruled that pursuant to section 102.14, interim Customs Regulations (19 CFR 102.14), the country of origin of the imported golf club sets is Canada, and thus marking the outside carton with the words "Assembled in Canada", was an acceptable country of origin marking for the imported golf club sets. We have determined, for the reasons set forth below, that our New York office erred in their analysis and conclusion that the Country of origin of the imported golf club sets is "Canada" pursuant to section 102.14 of the interim regulations. Thus, modification of that ruling is required.

Issue:

What are the country of origin marking requirements of the imported golf club sets which are assembled in Canada with U.S. components and Japanese-origin stainless steel heads in the manner described above?

Law and Analysis:

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

The country of origin marking requirements for a "good of a NAFTA country" are also determined in accordance with Annex 311 of the North American Free Trade Agreement ("NAFTA"), as implemented by section 207 of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057) (December 8, 1993). The rules currently used for determining the country of origin of a good imported from a NAFTA country ("Marking Rules") are contained in Part 102, interim Customs Regulations (19 CFR Part 102) [final rule published as T.D. 96–48 in the Federal Register on June 6, 1996, effective on August 5, 1996, 61 FR 28932].

Section 134.1(b) of the Customs Regulations defines "country of origin" as:

> the country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin within this part; *however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.* (Emphasis added).

Section 134.1(j) of the Customs Regulations provides that the "NAFTA Marking Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) of the Customs Regulations defines a "good of a NAFTA country" as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules. Section 134.45(a)(2) of the Customs Regulations provides that a "good of a NAFTA country" may be marked with the name of the country of origin in English, French or Spanish.

In this case, the golf club sets are assembled in Canada from U.S. and Japanese origin components. Thus, in order to determine the appropriate marking requirements for the

imported golf club sets, we must determine under the NAFTA Marking Rules the country of origin of the golf clubs which are assembled in Canada in the manner described above.

Section 102.11 of the interim Customs Regulations (19 CFR 102.11), sets forth the required hierarchy for determining country of origin of goods from NAFTA countries for marking purposes. Section 102.11(a) of the interim Customs Regulations states that "[t]he country of origin of a good is the country in which:

(1) The good is wholly obtained or produced;
(2) The good is produced exclusively from domestic materials; or
(3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other requirements of these rules are satisfied."

"Foreign Material" is defined in section 102.1(e) of the interim Customs regulations as "a material whose country of origin as determined under these rules is not the same country as the country in which the good is produced."

Since the individual golf clubs (7 irons and a pitching wedge) which make up the imported golf club sets are assembled in Canada from U.S. and Japanese components (foreign, as defined in section 102.1(e) of the interim regulations) the golf clubs are neither wholly obtained/produced nor produced exclusively from domestic materials. Therefore, paragraphs (a)(1) and (a)(2) of section 102.11 cannot be used to determine the country of origin of the golf club sets. Thus, paragraph (a)(3) of section 102.11 is the applicable rule that next must be applied to determine the origin of the finished article.

The three components (excluding fasteners) of the assembled golf clubs, in this case, consists of the U.S. origin stainless steel shaft and rubber grips, and the Japanese origin stainless steel heads. The completely assembled golf clubs are classified under subheading 9506.31, HTSUS. The stainless steel heads and shafts and the rubber golf grips are classified as parts of golf clubs under subheading 9506.39, HTSUS. The applicable change in tariff classification set out in section 102.20(s), Section XX, Chapters 94 through 96, 9506.31 of the interim regulations provides:

9506.31 .. A change to subheading 9506.31 from any other subheading, except subheading 9506.39.

In this case, since the foreign stainless steel shafts and heads and the rubber grips are classified under subheading 9506.39, HTSUS, they do not undergo the applicable change in tariff classification set out in section 102.20(s), and, as a result, section 102.11(b) of the hierarchical rules must be applied next to determine the country of origin of the assembled golf clubs.

Section 102.11(b) of the interim Customs Regulations provides that;

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a), the country of origin of the good:

(1) Is the country or countries of origin of the single material that imparts the essential character of the good, or
(2) If the material that imparts the essential character of the good is fungible, has been commingled, and direct physical identification of the origin of the commingled material is not practical, the country or countries of origin may be determined on the basis of an inventory management method provided under the Appendix to part 181 of the Customs Regulations.

Although the imported articles are commonly referred to as "golf club sets" they are not described in the Harmonized System as a set, or are classified as a set pursuant to General Rule of Interpretation 3. Thus, section 102.11(c) is not applicable, but section 102.11(b) must be applied in determining the origin of the golf clubs.

Applying section 102.11(b)(1), to the facts of this case, we find that there is no single material that imparts the essential character to the golf clubs. In our opinion, in this case, all three components (stainless steel golf club shafts and heads and the rubber golf club grips) are essential parts of the golf clubs. Accordingly, since section 102.11(c) is not applicable, section 102.11(d) of the hierarchical rules must be applied next to determine the country of origin of the golf clubs.

Section 102.11(d) of the interim Customs regulations provides that:

(d) Where the country of origin of the good cannot be determined under paragraph (a), (b) or (c) of this section, the country of origin of the good shall be determined as follows:

(1) The last country in which the good underwent production, other than by simple assembly or minor processing, or

(2) If the good is produced by simple assembly:

(i) The country in which the good is assembled if the parts that merit equal consideration as imparting the essential character of the good do not have the same country of origin, or

(ii) The country of origin of the parts assembled into the good that merit equal consideration as imparting the essential character of the good if all those parts have the same country of origin.

"Simple assembly" is defined in section 102.1(o) of the interim Customs Regulations as:

> the fitting together of five or fewer parts all of which are foreign (excluding fasteners such as screws, bolts, etc.) by bolting, *gluing*, soldering, sewing or by other means without more than minor processing. (Emphasis added).

Based on the facts in this case, the golf clubs are produced in Canada as a result of "simple assembly" since there are only three components (heads, shafts and grips) all of which (excluding fasteners) are foreign and are fitted together by gluing. On the other hand, since these components have different countries of origin—the U.S. and Japan—section 102.11(d)(2)(i) of the interim Customs Regulations, is the applicable rule for determining the country of origin of the golf clubs. Applying section 102.11(d)(2)(i) to the facts in this case, we find that the country of origin of the imported golf club sets is Canada—the country in which the goods are assembled.[1] Accordingly, the individual golf clubs or their retail containers in which the golf club sets are sold to the ultimate purchaser in the U.S., must be marked to indicate Canada as the country of origin of the golf club sets in accordance with the marking requirements of 19 U.S.C. 1304.

We note that while it appears that the golf clubs which are assembled from U.S. origin stainless steel heads and rubber grips are eligible for a partial duty exemption under 9802.00.80, HTSUS and that the country of origin marking requirements of 19 CFR 10.22 apply, please note that in T.D. 96–48 published at 61 F.R. 28932, 28955 (June 6, 1996) Customs has removed 19 CFR 10.22. Also, section 102.14 has been removed pursuant to T.D. 96–48 as well. These regulatory amendments will be effective for goods entered, or withdrawn from warehouse, for consumption on or after August 5, 1996,

However, pursuant to section 134.43(e), Customs Regulations (19 CFR 134.43(e)), also amended by T.D. 96–48 and effective on August 5, 1996, marking the retail containers in which the imported golf club sets are sold to the ultimate purchaser in the U.S. with the words, "Assembled in Canada", is an acceptable country of origin marking since Canada—the country of final assembly—is the country of origin of the golf club sets.

Holding:

Pursuant to 19 CFR 102.11(d)(2)(i) the country of origin of imported golf club sets which are assembled in Canada from U.S. origin stainless steel heads and rubber grips and Japanese-origin stainless steel shafts in the manner described above, is Canada. New York ruling 810816 is hereby modified in accordance with this ruling.

Pursuant to 19 CFR 134.43(e), marking the retail containers in which the golf club sets are sold to the ultimate purchaser in the U.S. with the words "Assembled in Canada" is an acceptable country of origin marking for the imported golf club sets under 19 U.S.C. 1304, for those that are entered, or withdrawn from warehouse, for consumption on or after August 5, 1996.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

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1. We note however, that pursuant to the amendments to section 102.11(d) set forth in T.D. 96–48 for goods entered or withdrawn from warehouse, for consumption on or after August 5, 1996, Canada will be the country of origin under section 102.11(d)(3).

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CADAVER BAGS (BODY BAGS)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying certain rulings pertaining to the tariff classification of cadaver bags (body bags). Notice of the proposed modification was published July 24, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 29/30.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse, for consumption on or after November 18, 1996.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 24, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 29/30, proposing to modify District Director (DD) Ruling Letter 848665, issued January 30, 1990, by the District Director of Customs, Philadelphia, PA, which held that cadaver bags (body bags) were classifiable under subheading 3923.90.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No comments were received concerning the matter.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interest parties that Customs is modifying DD 848665 to reflect the proper classification of the merchandise in subheading 3926.90.9890, HTSUSA, which provides for other articles of plastics, other. Merchandise so classified is subject to a general rate of duty of 5.3 percent *ad valorem*. HRL 958803 modifying DD 848665 is set forth in an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 27, 1996.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 27, 1996.

CLA–2 RR:TC:FC 958803 ALS
Category: Classification
Tariff No. 3926.90.9890

MR. MICHAEL O'NEILL
O'NEILL & WHITAKER, INC.
1809 Baltimore Avenue
Kansas City, MO 64108

Re: Modification of District Director Ruling Letter (DD) 848665, dated January 30, 1990, regarding cadaver/body bags and kits from Taiwan.

DEAR MR. O'NEILL:

In DD 848665 you were advised that body bags, including body bag kits, were classifiable in 3923.90.00, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). These bags were considered articles for the conveyance or packing of goods, of plastics. We noted that the ruling was based on the incorrect conclusion insofar as cadavers are not considered goods for tariff purposes. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 848665 was published July 24, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 29/30.

Facts:

The articles under consideration are body bags, which are made of a strong high grade plastic, with a heavy duty, rustproof nylon zipper that runs the full length of the bag, and body bag kits, which contain the body bag with a chin strap, cellulose pads, two 60″ ties, 3 bright yellow identification tags and 3 white I.D. tags. The articles, which come in two sizes and are intended for 1 time use, are used by hospitals, morgues, mortuaries, medical schools, as well as police, fire, ambulance and emergency vehicles for handling a cadaver.

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

DD 848665 held that the subject articles were classifiable under subheading 3923.90.0000, HTSUSA, the provision for articles for the conveyance or packing of goods, of plastics; other. In considering the propriety of that classification we considered the definition for the term "goods" contained in Harmonized Tariff Schedule of the United States, and in the Explanatory Notes (EN) to the Harmonized System. General Note 1, HTSUSA, provides that the Schedule covers goods imported into the United States and General Note 16, HTSUSA, exempts corpses, etc. from General Note 1. The EN to Rule 1 of the General Rules of Interpretation (GRI's), states that "[T]he Nomenclature sets out * * * goods handled in international trade."

In reviewing this nomenclature we have concluded that human remains are not an item which would be considered to be encompassed by the term "goods" as that term is used in the HTSUSA, i.e., a cadaver is not an article of trade. Thus, while we do not question the use of the bags, i.e., the transportation of human remains, we believe that since such remains are not "goods", the classification stated in the referenced ruling, which is dependent on the conveyance of goods, is incorrect. In this regard, we note that two subsequent rulings, New York Ruling Letter (NYRL) 886980, dated June 24, 1993, and NYRL 802516, dated September 30, 1994, classified body bags in subheading 3926.90.9890, HTSUSA, which provides for other articles of plastics, other.

Holding:

Cadaver bags (body bags) of plastics designed to transport human remains, as well as kits containing such bags and related items such as straps and pads, are classifiable in subhead-

ing 3926.90.9890, HTSUSA, which provides for other articles of plastics, other. Articles so classified are subject to a general rate of duty of 5.3 percent *ad valorem*.

DD 848665, dated January 30, 1990, is hereby modified. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF PROTECTIVE GEAR FOR USE IN THE SPORT OF IN-LINE SKATING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying certain rulings pertaining to the tariff classification of protective gear for use in the sport of in-line skating. Notice of the proposed modification was published July 24, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 29/30.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse, for consumption on or after November 18, 1996.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 24, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 29/30, proposing to modify Headquarters Ruling Letters (HRL) 957120 and 957396, dated January 31, 1995 and December 12, 1994, respectively, District Director Ruling Letter (DD) 898364, date June 20, 1994, and New York Ruling Letter (NYRL) 895546, dated March 28, 1994. These rulings variously held that protective gear used in the sport of in-line skating were classified under subheadings 6216.00.4600 or 9506.70.2090, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). One comment was received concerning the matter. It presented 2 arguments. One argument was

that the protective gear was an accessory to in-line skates. This argument was considered and responded to this commenter in HRL 958456, dated April 8, 1996. We find no basis for reconsidering that matter. The commenter also claims that the importer may have detrimentally relied on a prior ruling. We previously advised the commenter, in the aforementioned HRL, that we would consider its request for relief pursuant to the provision of section 177.9, Customs Regulations (19 CFR 177.9) when its written request, along with supporting information and documentation, is received. We note that the instant comment is not clear as to the specific nature of such reliance nor does it include the information and documentation that would be necessary to ascertain the applicability of the aforementioned regulatory provision.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interest parties that Customs is modifying HRL 957120 and 957396, dated January 31, 1995 and December 12, 1994, respectively, DD 898364, dated June 20, 1994, and NYRL 895546, dated March 28, 1994, to reflect the proper classification of the merchandise in subheading 9506.99.6080, HTSUSA. Merchandise so classified is subject to a general rate of duty of 4.4 percent *ad valorem*. HRL 959366 modifying HRL 957120 and DD 898364, and HRL 959376 modifying HRL 957396 and NYRL 895546, are set forth in Attachments A and B to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 3, 1996.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 3, 1996.
CLA-2 RR:TC:FC 959366 ALS
Tariff No. 9506.99.6080

MR. GORDON C. ANDERSON
MEYER CUSTOMS BROKERS
8100 Mitchell Rd., Suite 200
Eden Prairie, MN 55344

Re: Modification of Headquarters Ruling Letter (HRL) 957120, dated January 31, 1995, and District Ruling Letter (DD) 898365, June 20, 1994, regarding protective wrist guards designed for use in the sport of in-line skating.

DEAR MR. ANDERSON:

In DD 898364 you were advised that protective wrist guards for use in the sport of in-line skating were classifiable as gloves in subheading 6216.00.4600, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). In HRL 957120, which modified that ruling, we noted that such items, which do not have sheathes and fourchettes which cover the fingers and have only thumb holes and only cover the wrists and upper part of the hands, were classifiable in subheading 9506.70.2090, HTSUSA, as accessories for use in the sport of in-line skating.

Facts:

The articles under consideration, which are referred to as wrist guards, are fabricated from a combination of knit and mesh man-made fibers which provide the base of the guards, synthetic leather stitched on the stress areas, velcro® fastener straps, and molded plastic inserts on the back and front. The articles do not have sheathes and fourchettes which cover the fingers. They have thumb holes and only cover the wrists and upper part of the hands.

Issue:

What is the classification of the subject articles imported for use in the sport of in-line skating?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

The articles under consideration are protective gear which are utilized to protect the wearer while engaging in the sport of in-line skating. In considering the proper classification of these items we have reviewed subheadings 9506.70.2090 and 9506.99.6080, HTSUSA. The first noted subheading provides for "ice skates and roller skates, including skating boots with skates attached; parts and accessories thereof." We note, without discussion, that the subject articles are not skates, skating boots with skates attached or parts of skates. Thus, in order for the protective gear to be classified in subheading 9506.70.2090, HTSUSA, it must be considered as accessories of skates or skating boots.

As noted in Headquarters Ruling Letter (HRL) 956582, date March 14, 1995, an accessory is an article that is related to the primary article and is intended for use solely or principally with that primary article. The articles in that case were bands of knit terry cloth with a protective insert of either rigid plastic or closed-cell foam rubber. They were for use in various sports, e.g., baseball, football. These items were marketed in a similar manner to the instant protective gear insofar as they were to help avoid injuries and bruises. It was proffered therein that these bands were accessories to the sports clothing utilized in playing the particular game. We concluded that the bands were not related or connected to a primary article and were not intended for the sole or principal use as a clothing accessory and that they were protective equipment classifiable in subheading 9506.99.6080, HTSUSA.

We have noted that the term "accessory" is not defined in either the HTSUSA or the Explanatory Notes to the Harmonized System (EN). We, however, have repeatedly noted

that an accessory is, in addition to being an article related to a primary article, is used solely or principally with that article. We have also noted that an accessory is not necessary to enable the goods with which they are used to fulfill their intended function. They are of secondary importance, not essential of themselves. They, however, must contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation). (See HRL 953896, dated February 2, 1994 and HRL 950166, dated November 8, 1991). We have also noted that *Webster's Dictionary* defines an accessory as an object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else.

While the subject pads and guard protect the wearer from injury, they do not contribute to the effectiveness of the in-line skates by making them faster or smoother, or add any other capabilities to the skates. In other words, even though the protective gear may have a psychological effect on the wearer, it does not enhance the capabilities of the skates.

In order to ascertain first hand the method of marketing of this gear we visited several major sporting goods stores and a warehouse store. We observed the method of display and spoke to the professional staff in the sporting goods stores. We were unable to confirm that the gear is marketed as accessories to in-line skates. The items are marketed as protective gear or protective equipment. Retail advertising confirms such marketing method. While the packaging for the protective gear indicates that it is recommended for in-line skating, there was a lack of reference to such gear on the boxes containing such skates and the owner's manuals and other material in such boxes, when referring to such gear, referred to it as protective gear and not accessories to the skates. We also noted that the literature from some manufacturers indicates that the gear was suitable for other sports, e.g., skateboarding. This empirical observation confirmed our prior opinion that this protective gear is not an accessory to in-line skates.

We next compared subheading 9506.70.2090, HTSUSA, to other subheadings in heading 9506. While there is a similarity among these subheadings, we noted one significant difference. Whereas the other subheadings generally include equipment related to a specific sport or activity, e.g., baseball articles and equipment, in their coverage, subheading 9506.70.2090, HTSUSA, does not include a provision for equipment. Since we must presume that the drafters of that tariff provision intended to omit a reference to equipment and that it was not an oversight, we considered what other subheading might be applicable to the subject gear. We also concluded that the protective gear, while not necessary for the sport of in-line skating, was specially designed protective equipment for that sport.

In *Cruger's Inc. v. United States*, 12 Ct. Customs Appeals, 516,519, T.D. 40730 (1925), the Court indicated "the term equipment applies to those articles that are so essential or necessary to the game as to make it impossible to play the game without them." It further noted that the term "equipment" included inanimate objects ordinarily used and needed or required for the safe, proper, and efficient taking of physical exercise and efficient playing of any indoor or outdoor ball game or sport. Subsequently, in *Slazengers, Inc. v. United States*, 33 U.S. Customs Ct. Rpts. 338, Abs. 58323 (1954), the Court concluded that articles which serve "no other purpose but to aid in a safer and more efficient game * * * are within the designation of 'equipment'." In *American Astral Corporation v. United States*, 62 U.S. Customs Ct. Rpts. 563, 571, C.D. 3827 (1969), after referencing a tariff classification study, the Court concluded "* * * the statutory designation of "equipment" is satisfied once it is shown that the article is specially designed for use in the game or sport." (See also *Nichimen Co. v. United States*, 72 U.S. Customs Ct. Rpts. 130, C.D. 4514 (1974)).

Consequently, "equipment" for purposes of the sports provision of heading 9506 is generally considered to include not only those articles that are essential or necessary to the play of a game or sport but the gear specially designed for use by the player in connection with the game or sport. Accordingly, the instant protective gear, being specially designed for use in connection with the sport of in-line skating, is skating equipment for tariff purposes and is classifiable in the residual provision of heading 9506.

Holding:

Protective articles such as wrist guards without fourchettes, elbow pads and knee pads primarily designed to be used in the sport of in-line skating and composed of plastic materials and binding straps with Velcro™ fasteners are considered equipment for that sport and are classifiable in subheading 95.06.99.6080, HTSUSA. Merchandise so classifiable is subject to a general rate of duty of 4.4 percent *ad valorem*.

DD 898364 and HRL 957120 are hereby modified, as to all the articles covered by those rulings, to conform to this holding.

JOHN ELKINS,
(for John Durant, Director
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 3, 1996.

CLA–2 RR:TC:FC 959376 ALS
Tariff No. 9506.99.6080

MR. GORDON C. ANDERSON
MEYER CUSTOMS BROKERS
8100 Mitchell Rd., Suite 200
Eden Prairie, MN 55344

Re: Modification of Headquarters Ruling Letter (HRL) 957396, dated December 12, 1994, and New York Ruling Letter (NYRL) 895546, dated March 28, 1994, regarding certain protective gear designed for use in the sport of in-line skating.

DEAR MR. ANDERSON:

In NYRL 895546 you were advised that certain protective wrist guards for use in the sport of in-line skating were classifiable in subheading 6216.00.4600, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). In HRL 957396, which modified that ruling, we noted that such items, half-fingered gloves with sheathes and fourchettes, were classifiable in subheading 9506.70.2090, HTSUSA, when imported with other protective gear, i.e., elbow and knee pads, as a set for use in the sport of in-line skating.

Facts:

The articles under consideration which are referred to as wrist guards are fabricated from a combination of knit and mesh man-made fibers which provide the base of the guards, synthetic leather on the palms, velcro® fastener straps, and molded plastic on the backs and fronts. The articles have sheathes with fourchettes which partially cover the fingers.

Issue:

What is the classification of the subject articles when imported in a set composed of various protective items for use in the sport of in-line skating?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

The articles under consideration are protective gear which are utilized to protect the wearer while engaging in the sport of in-line skating. In considering the proper classification of these items we have reviewed subheadings 9506.70.2090 and 9506.99.6080, HTSUSA. The first noted subheading provides for "ice skates and roller skates, including skating boots with skates attached; parts and accessories thereof." We note, without discussion, that the subject articles are not skates, skating boots with skates attached or parts of skates. Thus, in order for the protective gear to be classified in subheading 9506.70.2090, HTSUSA, it must be considered as accessories of skates or skating boots.

As noted in Headquarters Ruling Letter (HRL) 956582, date March 14, 1995, an accessory is an article that is related to the primary article and is intended for use solely or principally with that primary article. The articles in that case were bands of knit terry cloth

with a protective insert of either rigid plastic or closed-cell foam rubber. They were for use in various sports, e.g., baseball, football. These items were marketed in a similar manner to the instant protective gear insofar as they were to help avoid injuries and bruises. It was proffered therein that these bands were accessories to the sports clothing utilized in playing the particular game. We concluded that the bands were not related or connected to a primary article and were not intended for the sole or principal use as a clothing accessory and that they were protective equipment classifiable in subheading 9506.99.6080, HTSUSA.

We have noted that the term "accessory" is not defined in either the HTSUSA or the Explanatory Notes to the Harmonized System (EN). We, however, have repeatedly noted that an accessory is, in addition to being an article related to a primary article, is used solely or principally with that article. We have also noted that an accessory is not necessary to enable the goods with which they are used to fulfill their intended function. They are of secondary importance, not essential of themselves. They, however, must contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation). (See HRL 952896, dated February 2, 1994 and HRL 950166, dated November 8, 1991). We have also noted that *Webster's Dictionary* defines an accessory as an object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else.

While the subject pads and guard protect the wearer from injury, they do not contribute to the effectiveness of the in-line skates by making them faster or smoother, or add any other capabilities to the skates. In other words, even though the protective gear may have a psychological effect on the wearer, it does not enhance the capabilities of the skates.

In order to ascertain first hand the method of marketing of this gear we visited several major sporting goods stores and a warehouse store. We observed the method of display and spoke to the professional staff in the sporting goods stores. We were unable to confirm that the gear is marketed as accessories to in-line skates. The items are marketed as protective gear or protective equipment. Retail advertising confirms such marketing method. While the packaging or the protective gear indicates that it is recommended for in-line skating, there was a lack of reference to such gear on the boxes containing such skates and the owner's manuals and other material in such boxes, when referring to such gear, referred to it as protective gear and not accessories to the skates. We also noted that the literature from some manufacturers indicates that the gear was suitable for other sports, e.g., skateboarding. This empirical observation confirmed our prior opinion that this protective gear is not an accessory to in-line skates.

We next compared subheading 9506.70.2090, HTSUSA, to other subheadings in heading 9506. While there is a similarity among these subheadings, we noted one significant difference. Whereas the other subheadings generally include equipment related to a specific sport or activity, e.g., baseball articles and equipment, in their coverage, subheading 9506.70.2090, HTSUSA, does not include a provision for equipment. Since we must presume that the drafters of that tariff provision intended to omit a reference to equipment and that it was not an oversight, we considered what other subheading might be applicable to the subject gear. We also concluded that the protective gear, while not necessary for the sport of in-line skating, was specially designed protective equipment for that sport.

In *Cruger's Inc. v. United States*, 12 Ct. Customs Appeals, 516,519, T.D. 40730 (1925), the Court indicated "the term equipment applies to those articles that are so essential or necessary to the game as to make it impossible to play the game without them." It further noted that the term "equipment" included inanimate objects ordinarily used and needed or required for the safe, proper, and efficient taking of physical exercise and efficient playing of any indoor or outdoor ball game or sport. Subsequently, in *Slazengers, Inc. v. United States*, 33 U.S. Customs Ct. Rpts. 338, Abs. 58323 (1954), the Court concluded that articles which serve "no other purpose but to aid in a safer and more efficient game * * * are within the designation of 'equipment'." In *American Astral Corporation v. United States*, 62 U.S. Customs Ct. Rpts. 563, 571, C.D. 3827 (1969), after referencing a tariff classification study, the Court concluded "* * * the statutory designation of "equipment" is satisfied once it is shown that the article is specially designed for use in the game or sport." (See also *Nichimen Co., v. United States*, 72 U.S. Customs Ct. Rpts. 130, C.D. 4514 (1974)).

Consequently, "equipment" for purposes of the sports provision of heading 9506 is generally considered to include not only those articles that are essential or necessary to the play of a game or sport but the gear specially designed for use by the player in connection with the game or sport. Accordingly, the instant protective gear, being specially designed

for use in connection with the sport of in-line skating, is skating equipment for tariff purposes and is classifiable in the residual provision of heading 9506.

Holding:

Protective articles such as wrist guards without fourchettes, elbow pads and knee pads primarily designed to be used in the sport of in-line skating and composed of plastic materials and binding straps with velcro ™ fasteners are considered equipment for that sport and are classifiable in subheading 9506.99.6080, HTSUSA. Merchandise so classifiable is subject to a general rate of duty of 4.4 percent *ad valorem*.

DD 895546 and HRL 957396 are hereby modified, as to all the articles covered by those rulings, to conform to this holding.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

DESIGNATED TEST CASE

(Slip. Op. 96–139)

HI-TECH SPORTS, USA, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–06–00349

(Decided August 16, 1996)

Law Offices of George R. Tuttle, and *Stephen S. Spraitzer,* for Plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-In-Charge, and *Bruce N. Stratvert,* International Trade Field Office, Civil Division, Dept. Of Justice, Commercial Litigation Branch; *Mark G. Nackman,* United States Customs Service, of counsel, for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WALLACH, *Judge:* This matter having come on for trial in San Francisco, California, on the 20th day of March, 1996, the parties having submitted it for decision and judgment after completion of the trial on the 22nd day of March, 1996, the Court having considered the parties' Post-Trial Briefs submitted on the 3rd day of July, 1996, and their Reply Briefs submitted on the 22nd day of July, 1996, and having given due consideration to the testimony of two witnesses for Plaintiff, and four for Defendant, together with due consideration of all stipulated facts and all evidence admitted at trial, the Court, pursuant to CIT Rule 52(a) now finds facts and sets forth its conclusions of law, and enters Judgment for Plaintiff pursuant to these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) This action involves classification under the Harmonized Tariff Schedule of The United States (HTSUS) of seven styles of lightweight hiking boots imported into the United States by Plaintiff, Hi-Tech Sports, USA. Those boots are known as the Ranier II, The Midnite, the Gannett Peak II, the Magnum, the Kings Peak II, the Sundance, and the Sierra Lite II.

2) The imported boots were classified by the United States Customs Service (Customs) under HTSUS subheading 6404.19.15.

3) Plaintiff contends that the boots should have been classified under HTSUS subheading 6403.91.60. All classifications were properly protested and all liquidated duties were paid.

4) The imported merchandise consists entirely of boots with combination uppers, consisting of leather and Cordura nylon. They are a lineal descendant of all-leather hiking boots in which a portion of the leather has been replaced with Cordura nylon where such replacement does not affect the structural integrity of the boot, yet reduces its weight and cost.

5) The essential structure of each boot's upper is derived from its leather components which contribute strength and durability to the boot, and provide support to the wearer's foot and ankle. While the evidence in this area was conflicting, the Court found most credible the testimony of Carl Nowak who possessed much more experience and a higher degree of expertise in the area of shoe design and construction and the terminology used in the footwear industry in the United States than any of the other witnesses.

6) The upper is lasted or fastened to the sole by a cold cement process. The only material intentionally cemented to the sole for purposes of lasting is the leather portion of the upper. The cementing of Cordura is sporadic, and is either unintentional or serves only to prevent the Cordura from pulling away from the sole area, and irritating the user's foot. The Cordura is specifically not used for strength or structural purposes, except as it may serve to reinforce the leather against certain stretching forces. The Cordura does not serve to last the uppers to the sole of the boot.

7) Given the style and manner of construction of the boots at issue, if they were constructed without leather they would lack sufficient support, rigidity or strength for their intended use as hiking boots, and they would quickly fall apart in use.

8) The leather portion of the Hi-Tech boots at issue into which eyelet holes are placed serves a greater function than just as a reinforcement or stay for eyelets and is, in fact, an essential structural portion of the boots. Accordingly, that leather portion is more than an eyelet stay and it is not an accessory or reinforcement.

9) The constituent material of the upper of each of the boots at issue (except as set forth below) is a combination of Cordura nylon and leather with leather predominating.

10) The Court specifically finds that the testimony of Defendant's witnesses Eric Merck, Richard Bunch and Eric Francke was not credible, as it related to the central issue of the structural purpose of leather in construction of the boots at issue, or to terminology used in the footwear industry. Those witnesses lacked expertise on those issues.

11) The Court finds that the testimony of Defendant's witness James Sheridan was entitled to some weight but that his failure to closely examine all but one of the styles of boots at issue, and his relative lack of

expertise compared to Carl Nowak, made his testimony less credible and insufficient to rebut Mr. Nowak's testimony.

12) The Court finds that the testimony of Plaintiff's witness Terry McNess was entitled to some weight on the origins of Hi-Tech boots, their uses and the intent of the manufacturer. Mr. McNess lacked expertise on the central issue of structural purposes of leather in the boots and his testimony was disregarded on that issue.

13) Accordingly, and taking into account the stipulation signed by the parties at trial which leaves certain issues uncontested[1], the Court finds as follows regarding the contested issues relating to the imported items. The numbers referenced are those used in the stipulation and the attachments thereto. The following should be included in the ESAU calculation:

a) Ranier II: The exposed areas of A–1, A–2, A–3 and A–4, and the areas of A–1 and A–3 overlapped by C–3 and C–4 above the insole;

b) Midnite: The exposed areas of A–1, A–2 A–3 and A–4, and the areas of A–1, A–2 and A–3 overlapped by C–2 and C–3 above the insole;

c) Gannett Peak II: the exposed areas of A–2 and A–3 and the area A–3 overlapped by C–3 above the insole;

d) Magnum: the exposed areas of A–1, A–2, A–3 and A–4 and the areas of A–1, A–2 and A–3 overlapped by C–2 and C–3 above the insole;

e) Kings Peak II: the exposed areas of A–1, A–2, A–3, A–4 and A–5 and the areas of A–1, A–3 and A–4 and A–5 overlapped by C–2 and C–3 above the insole;

f) Sundance: the exposed areas of A–1(a), A–1(b), A–2, A–5, A–6 and A–8 and the areas of A–1(a), A–1(b), A–5 and A–6 overlapped by C–2 and C–3 above the insole; and

g) Sierra Lite II: the exposed area of A–1, A–2, A–3, A–4 and A–6 and the area of A–1 which is overlapped by C–3 above the insole.

14) If any of these Findings of Fact shall more properly be Conclusions of Law they shall be deemed to be so.

CONCLUSIONS OF LAW

1) This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a).

2) Customs' factual determinations are entitled to a presumption of correctness. 28 U.S.C. § 2639(a)(1) (1988); *Goodman Mfg. L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). The burden of proving that Customs' determination is incorrect rests with the party challenging it. 28 U.S.C. § 2639(a)(1).

3) Through the testimony of Carl Nowak, and the other evidence introduced at trial, Hi-Tech has met its burden of demonstrating Customs' determination is incorrect.

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[1] The Parties, by Stipulation, agreed that certain parts of the seven boot styles at issues were accessories or reinforcements. Those included plastic hooks and eyelet stays, rubber kick plates, and areas of overlap or rubber and/or plastic above the insole, metal eyelets, logos, pull tabs, ankle patches, edging/binding, and D-rings. They also agreed that the tongues of the boots in issues would not be included in the External Surface Area of the Upper (ESAU) calculation.

4) Customs' classification under HTSUS subheading 6404.19.15 covers footwear with uppers of textile materials. Hi-Tech's claimed classification under HTSUS subheading 6403.91.60 covers footwear with uppers of leather.

5) Note 4(a) to Chapter 64 HTSUS provides that "the material of the upper shall be taken to be the constituent material having the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments."

6) The leather portions of the imported boots listed under Finding of Fact 13 are constituent materials of the upper and are not accessories or reinforcements. Classification of the merchandise here at issue can not be completed without determination of the ESAU.[2]

7) If any of these Conclusions of Law shall more properly be Findings of Fact they shall be deemed to be so.

(Slip Op. 96–140)

AMITY LEATHER CO. AND LUGGAGE AND LEATHER GOODS MANUFACTURERS OF AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFEDNANT, AND COLONY ONE TRADING CORP., CONSIGNEE, PARTY IN INTEREST

Court No. 95–01–00036

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted; Action dismissed.]

(Decided August 20, 1996)

Sandler, Travis & Rosenberg (Leonard L. Rosenberg, Paul G. Giguere), counsel for Plaintiffs.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *Barbara M. Epstein,* Civil Division, Dept. of Justice, Commercial Litigation Branch; *Karen P. Binder,* Assistant Chief Counsel, International Trade Litigation, United States Customs Service, Of counsel, for Defendant.

Serko & Simon (Joel K. Simon, Daniel J. Gluck, Barbara Y. Wierbicki), counsel for Consignee, Party in Interest.

Siegel Mandell & Davidson (Brian S. Goldstein, Steven S. Weiser, Paul A. Horowitz), counsel for amici curiae Liz Claiborne Accessories, Inc., Louis Vuitton Hawaii, Inc., and Louis Vuitton N.A., Inc.

Rode & Qualey (William J. Maloney) counsel for amicus curiae Cartref, Ltd. d/b/a/ MCM.

OPINION

POGUE, *Judge:* Plaintiffs, domestic parties in interest, have invoked this Court's jurisdiction under 28 U.S.C. § 1581 (b), challenging a deci-

[2] Pursuant to stipulation of the parties, they will calculate the actual ESAU for each boot style here at issue following the results of this decision. Following submission of such calculations to this Court, a final Judgment will be entered.

sion of the United States Customs Service[1] which denied plaintiffs' petition filed pursuant to section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (1994). The action involves the proper classification of non-rigid plastic flat goods within subheading 4202.32 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The provisions under consideration are as follows:

4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper:	
* * *	* * * * *	
	Articles of a kind normally carried in the pocket or in the handbag:	
* * *	* * * * *	
4202.32	With outer surface of sheeting of plastic or of textile materials:	
	With outer surface of sheeting of plastic:	
4202.32.10	Of reinforced or laminated plastics	12.1¢/kg + 4.6%
4202.32.20	Other	20%

Customs' classification is before the Court for de novo review pursuant to 28 U.S.C. § 2640(a)(1994) on the summary judgment motions of the plaintiffs and defendant. The consignee in interest, Colony One Trading Corporation, submitted a brief in support of defendant's motion. The Court also received several briefs amici curiae in support of defendant's motion.[2] The issue in the case is the meaning of the phrase "of reinforced or laminated plastics" in HTSUS subheading 4202.32.10.

UNDISPUTED FACTS

The merchandise at issue consists of a change purse made of non-rigid plastic with an outer surface of plastic sheeting backed by a textile material that provides support. The textile fabric has been joined to the plastic sheeting by heat and pressure. There is no dispute that the

[1] T.D. 94–70, Cust. B. & Dec. No. 36 at 2 (1994).

[2] Liz Claiborne Accessories, Inc., Louis Vuitton Hawaii, Inc., and Louis Vuitton N.A., Inc. filed an amicus brief in support of defendant's cross motion for summary judgment and in opposition to plaintiff's motion for summary judgment. Cartref, Ltd. d/b/a MCM filed a separate amicus brief in support of defendant's cross motion and in opposition to plaintiff's motion.

merchandise in question is classifiable under the six-digit subheading 4202.32 HTSUS.[3]

BACKGROUND

Prior to the conversion to the HTSUS in 1989, the tariff term "Of reinforced or laminated plastics" was defined in the predecessor TSUS to include a requirement of rigidity:

> (i) *rigid,* infusible, insoluble plastics formed by the application of heat and high pressure on two or more superimposed layers of fibrous sheet material which has been impregnated or coated with plastics, or
>
> (ii) *rigid* plastics comprised of imbedded fibrous reinforcing material (such as paper, fabric, asbestos, and fibrous glass) impregnated, coated or combined with plastics usually by the application of heat or heat and low pressure.

Schedule 7, Part 12, Subpart A, Headnote 2, TSUS (emphasis added).[4] The definition set forth in the TSUS was not included in the HTSUS. The HTSUS has no parallel or like definition of the tariff term "of reinforced or laminated plastics."

When first considering classification under subheading 4202.32 HTSUS, Customs applied the TSUS definition requiring *rigidity* to the term "of reinforced or laminated plastics;" Customs classified non-rigid plastic "flat goods" under subheading 4202.32.20 HTSUS ("other") which carries a 20% ad valorem rate. *See* Headquarters Ruling Letters HQ 083415 (May 18, 1989), HQ 084929 (Aug. 22, 1989), HQ 087210 (May 10, 1991). In 1991 Customs reconsidered its classification of non-rigid plastic flat goods under the HTSUS and began classifying those items under the *lower* tariff rate provision 4202.32.10 HTSUS covering "reinforced or laminated" plastic flat goods. *See Liz Claiborne v. United States,* Consolidated Court No. 89–10–00562, (CIT April 11, 1991)(stipulated judgment on agreed statement of facts).[5] In so doing Customs abandoned the old TSUS definition requiring rigidity. Plaintiffs, domestic manufacturers of non-rigid flat goods, commenced this action to

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[3] Additional U.S. Note 2 to Chapter 42 states: "articles of textile fabric impregnated, coated, covered or laminated with plastics (whether compact or cellular) shall be regarded as having an outer surface of textile material or of plastic sheeting, depending upon whether and the extent to which the textile constituent or the plastic constituent makes up the exterior surface of the article."

[4] The TSUS provision governing flat goods provided:

> (c) the term "flat goods" covers small flatwares designed to be carried on the person, such as banknote cases, bill cases, billfolds, bill purses, bill rolls, card cases, change purses, cigarette cases, coin purses, coin holders, compacts, currency cases, key cases, letter cases, license cases, money cases, pass cases, passport cases, powder cases, spectacle cases; stamp cases, vanity cases, tobacco pouches, and similar articles.
>
> * * * * * * *
>
> Luggage and handbags, whether or not fitted with bottle, dining, drinking, manicure, sewing, traveling, or similar sets; and flat goods:
>
> Of reinforced or laminated plastics:
>
> 706.42 Flat Goods ..... 6.1¢ per lb.+5.1% ad val.
> 706.43 Other ..... 6.1¢ per lb.+5.1% ad val.
>
> Of other material:
>
> Other:
>
> 706.61 Flat goods ..... 20% ad val.
> 706.62 Other ..... 20% ad val.

Schedule 7, Part 1, Subpart D, TSUS.

[5] Customs subsequently modified its earlier rulings: Headquarters Ruling Letter HQ 951905 (January 6, 1993) modified HQ 084929; Headquarters Ruling Letter HQ 953130 (January 6, 1993) modified HQ 087210.

challenge the lower tariff rate classification and consequent weakening of protection for the domestic industry. Plaintiffs argue that the term "of reinforced or laminated plastics" should be narrowly defined and require rigidity like its statutory definition in the predecessor TSUS. The defendant and the party in interest argue for a construction of the phrase "reinforced or laminated plastics" in accord with its clear and unambiguous common meaning which encompasses the goods in question.

DISCUSSION

Rule 56 of this court permits summary judgment when "there is no genuine issue as to any material fact * * *." USCIT R. 56(d). Customs' classification is before this court for de novo review pursuant to 28 U.S.C. § 2640(a)(2) (1994). The court makes "its determinations upon the basis of the record made before the court." *Id.* In addition, the legislative mandate specifically directs the court to determine the correct classification for the merchandise involved. 28 U.S.C. § 2643(b) (1994). In establishing the classification, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, *reh'g denied*, 2 Fed. Cir. (T) 97 (1984).

"The ultimate issue as to whether particular imported merchandise has been classified under an appropriate tariff provision * * * entails a two step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (1994). The first step is a question of law; the second, a question of fact. *E.M. Chem. v. United States*, 9 Fed. Cir. (T) 33, 35 (1990); *see also, Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995). In the present case, the only issue in controversy is the meaning and scope of the tariff term "of reinforced or laminated plastics"—a question of law. *See United States v. Florea & Co., Inc.*, 25 CCPA 292, 296 (1938). Accordingly, summary judgment is appropriate.[6]

Rule 1 of the General Rules of Interpretation of the Harmonized Tariff Schedule provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." Gen. R. Interp. 1, HTSUS. When a tariff term is not specifically defined in the HTSUS and its intended meaning is not indicated in its legislative history, the term is to be construed in accordance with its common and popular meaning. *E.M. Chemicals v. United States*, 9 Fed. Cir. (T) 33, 37 (1990). In ascertaining common meaning, the court may rely on its own understanding of the term used, and may consult dictionaries, scientific authorities, and other reliable sources of information. *Brookside*

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[6] In interpreting the meaning of a tariff term under the HTSUS, the court does not apply the two-step analysis of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). *See Anval Nyby Powder AB v. United States*, 927 F. Supp 463, 467–469 (1996), *appeal docketed*, No. 96–1438 (Fed. Cir. July 5, 1996).

Veneers, Ltd. v. United States, 6 Fed. Cir. (T) 121, 125, *cert. denied,* 488 U.S. 943 (1988).

The HTSUS does not define the terms "reinforced," "laminated," "reinforced plastic," or "laminated plastic." These terms are, however, defined in various dictionaries, and "rigidity" is not included among the definitions. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1915 (1993) defines "reinforce" as "to strengthen with additional force, assistance, material or support: make stronger or more pronounced." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1522 (3d ed. 1992) defines it as "to strengthen by adding extra support or material." THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) defines "reinforced plastic" as "plastic strengthened by the inclusion of a layer of fibre (esp. glass)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1267 (1993) defines "laminated plastic" as "a plastic made of superposed layers of paper, wood, or fabric bonded or impregnated with resin and compressed under heat." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1010 (3d ed. 1992) defines "laminated" as "composed of layers bonded together." *See also American Hardboard Ass'n v. United States,* 12 CIT 714, 719 (1988); *Richard Crittall Radiant Heating Corp. v. United States,* 27 Cust. Ct. 193, 195, C.D. 1369 (1951).

Similarly, within the flat goods industry the listed terms do not have a rigidity requirement.[7] The industry meanings of the words "reinforced or laminated plastics" are substantially the same as the dictionary definitions, and those meanings do not limit the scope of the tariff term to "rigid" merchandise. Guided by the rule that "[a]bsent clear legislative intent to the contrary, the plain meaning of the statute will prevail," *Lynteq, Inc. v. United States,* 976 F.2d 693, 696 (Fed. Cir. 1992) (quoting *United States v. Turkette,* 452 U.S. 576, 580 (1981) *and Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980)), the Court must conclude that the non-rigid flat goods in question are covered by the tariff provision for "reinforced or laminated plastics" and that Customs' classification is correct.

Plaintiffs claim that a competing interpretation of the tariff term based on its prior TSUS definition requiring rigidity renders the phrase ambiguous. Plaintiffs contend that the TSUS definition was an inseparable term of art that was read as a whole to require rigidity and that the phrase was not parsed into the two concepts "reinforced plastics" or "laminated plastics." Plaintiffs further argue that legislative history and certain extrinsic aids of statutory construction manifest clear Con-

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[7] Steven M. Hurwitz Aff. ¶¶ 7 *filed as Exhibit 3 in* Defendant's Cross-Motion for Summary Judgment ("reinforced plastics" refers to "plastics material which has been attached to or combined with another material such as fabric backing to give the plastic sheeting added strength and retard tearing.") Charles Hora Aff. ¶¶ 11, 15, *filed as Exhibit 4 in* Defendant's Cross-Motion for Summary Judgment ("reinforced plastics" refers to "a plastic sheeting reinforced with some type of material, generally a fabric, to improve the physical properties of the plastic and thereby provide strength and avoid tearing or any other damage to the goods"; "laminated plastics" refers to "a material consisting of layers of plastic sheeting and textile material which are joined under heat and pressure."); Jean Pierre Colomb Aff. ¶ 8, *filed as Exhibit 5 in* Defendant's Cross-Motion for Summary Judgment. Stephane Sandillon Aff. ¶¶ 5,6, *filed as Exhibit 6 in* Defendant's Cross-Motion for Summary Judgment. Michael Vogel Aff. ¶ 5, *filed as Exhibit 7 in* Defendant's Cross-Motion for Summary Judgment.

gressional intent to continue application of this TSUS definition. Specifically, plaintiffs rely on a Trade Policy Staff Committee (TPSC) paper from the Office of the United States Trade Representative on the Harmonized System Conversion. Plaintiffs also rely on the tariff conversion schedules and the concept of tariff neutrality. The Court is not persuaded by these arguments.

First, the Court is not convinced that the TSUS definition of the phrase of "reinforced or laminated plastics" was an inseparable statutory term of art. Instead, the TSUS *separately* defined "reinforced plastics" in headnote 2(ii), and "laminated plastics" in headnote 2(i),[8] undercutting Plaintiffs' "term of art" argument.

Second, where the statutory language of the HTSUS is clear, resort to the TSUS is not necessary, *Pima Western, Inc. v. United States*, 915 F.Supp. 399, 404–405 (1996); if the HTSUS term is clear, e.g., the common and commercial meaning of a term are the same and alternate meanings are not apparent from the context of the statute,[9] the existence of a prior statutory definition in the TSUS does not create an ambiguity in the HTSUS. Here, the provision in the HTSUS leads to a clear outcome through application of the term's plain, ordinary, and popular meaning which is consistent with its commercial meaning.

Third, if anything is to be gleaned about legislative intent from the old TSUS definition, it is that the omission of this long standing definition upon conversion to the HTSUS was deliberate. As stated in *Bentkamp v. United States*, 40 CCPA 70 (1952):

> Ordinarily, where the essential word that supports a construction contended for appeared in an earlier act and has been omitted in a subsequent one by Congress, the omitted word may not be restored in the terms of the law by judicial construction. *United States v. Marsching*, 1 Ct. Cust. Appls. 216, [218 (1911)]. Such a change of legislative language is presumed to evidence an intent on the part of Congress to effect a change in meaning. *United States v. Post Fish Co.*, 13 Ct. Cust. Appls. 155, [158 (1925)].

Id. at 77. The omission of a long-standing statutory definition represents a significant change in statutory language. *Id.* Not only was an express statutory definition omitted, but a new subheading "With outer surface of sheeting of plastic" was added to chapter 4202.32, HTSUS. Moreover, the phrase "of reinforced or laminated plastics" appears in *several* provisions in the HTSUS,[10] all of which had comparable provisions in the TSUS, making it unlikely that Congress forgot through inadvertence or otherwise to include a definition applicable to *multiple provisions* upon conversion. *See Magnesium Elektron v. United States*,

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[8] *See* definition set forth in the text *supra*.

[9] "It is well settled that 'ambiguity is a creature not of definitional possibilities but of statutory context.' When engaging in statutory construction, the court must look to the entire context of the relevant section of the statute and not merely to the individual word." *Marcor Development Corp. v United States*, 926 F.Supp. 1124, 1129 (1996) *(quoting Brown v. Gardner*, 115 S.Ct. 552, 555 (1994)) (additional citations omitted).

[10] 6506.10.30, HTSUS ("Other headgear, whether or not lined or trimmed: Safety headgear: Of reinforced or laminated plastics."); 9401.80.20, HTSUS ("Other seats: Of rubber or plastics: Of reinforced or laminated plastics"); 9403.70.40, HTSUS ("Other furniture and parts thereof: Furniture of plastics: Of reinforced or laminated plastics").

50 Cust. Ct. 71, 73 C.D. 2391 (1963). The omission, therefore, appears to have been intentional.

Plaintiffs rely on *Lonza, Inc. v. United States,* 849 F. Supp. 51 (1994), *aff'd,* 46 F.3d 1098 (Fed. Cir. 1995), to support the proposition that an omitted TSUS definition survives under the HTSUS unless there is clear evidence of legislative intent to embrace an alternative definition. This Court does not read *Lonza* as abrogating the canon that a change of statutory language is presumed to evidence a change of legislative intent. In *Lonza,* the TSUS definition of the term "drugs" was omitted from the HTSUS. Unlike this case, however, in *Lonza* the common and commercial meanings of the term "drugs" were the same as the TSUS definition, leading the *Lonza* court to conclude that the TSUS definition survived under the HTSUS. *Id* at 59. Given the similarity between the common and commercial meanings, and the long-standing TSUS definition, the *Lonza* court stated that it would require clear evidence of legislative intent to embrace a *different* construction of the term "drugs." *Id.* This articulation, however, was specific to the case at hand and was not aimed at abrogating a canon of statutory construction.

In this case the common meaning of the term "of reinforced or laminated plastics" is different from its prior TSUS definition. For the TSUS definition to survive in this instance, there would have to be clear evidence of legislative intent to continue application of the omitted definition. To require otherwise would reject the traditional rule of tariff interpretation that a statutorily undefined term's common meaning is its correct meaning.

Plaintiffs' contention that legislative history and extrinsic aids of statutory construction demonstrate a clear legislative intent to continue the TSUS definition is unpersuasive. Plaintiff relies on a Trade Policy Staff Committee (TPSC) paper from the Office of the United States Trade Representaive on the Harmonized System Conversion. Buried in a discussion of the Israeli Free Trade Area is the statement: "* * * the TPSC Subcommitte on Israel, with advice from the Task Force, reviewed the conversion [to the Harmonized System] and identified the most sensitive areas in which breakouts would be needed to continue treatment agreed to under the FTA." The "breakouts" list proposed HTSUS subheadings 4202.32.10 and 4202.32.20. From this document Plaintiff concludes that Congress intended to continue the TSUS definition for "reinforced or laminated plastics" under the HTSUS. This conclusion is based on the inference that "continue[d] treatment" under HTSUS subheadings 4202.32.10 and 4202.32.20 necessarily requires application of the TSUS definition for "reinforced or laminated plastics."

The Court does not agree that the reference in the TPSC document indicates a clear legislative intent to continue the TSUS definition under the HTSUS. The TPSC paper does not mention the TSUS definition for "reinforced or laminated plastics," and the definition's continued application under the HTSUS is not specifically addressed. This

lack of precision limits the document's persuasive weight. Without such precision, the Court cannot read a definition into the HTSUS that has been expressly omitted. *Bentkamp,* 40 CCPA at 77.

Plaintiffs' reliance on the tariff conversion schedules and the concept of tariff neutrality is also unpersuasive. Plaintiffs argue that the concept of tariff neutrality and the TSUS\HTSUS Conversion tables set forth in the *Continuity of Import and Export Trade Statistics After Implementation of the Harmonized Commodity Description and Coding System,* USITC Pub. 2051 (Jan. 1988), which cross-references items under the TSUS with subheadings under the HTSUS, support its contention that Congress intended to continue application of the TSUS definition. Under the table, subheading 4202.32.10, HTSUS, is dutiable at the same rate previously applicable to TSUS item 706.42 (which provided for flat goods of reinforced or laminated plastics), and subheading 4202.32.20 ("other" than reinforced or laminated) is dutiable at the same rate previously applicable to TSUS item 706.61. Plaintiff claims that this demonstrates an intent that subheading 4202.32.10 be restricted to flat goods with an external surface of "rigid" plastic sheeting.

This Court in *SGI, Inc. v. United States,* 927 F.Supp. 463 (1996), *appeal docketed,* 96–1272 (March 21, 1996), considered the persuasive weight the Court should give the *Conversion Tables* in construing terms under the HTSUS, and concluded that, "although a relevant guide to the Court's inquiry, the [Tables are] not entitled to great weight; 'the conversion cross-reference must in all cases be approached cautiously as a guide to the scope of the HTSUS provisions,' *and 'are not intended, nor should they be viewed as a substitute for, the traditional tariff classification process.'*" *Id.* at 30–31 *(quoting Marubeni Am. Corp. v. United States,* 905 F. Supp. 1101, 1110–1111 (1995) (emphasis added). Here the statute has changed: a definition has been omitted and a new subheading has been added. Interpretation of the phrase according to its common and popular meaning leads to a clear, unambiguous result. The *Conversion Tables* cannot alter this consequence of traditional interpretation of a statutorily undefined tariff term. *See Marubeni Am. Corp. v. United States,* 905 F. Supp. 1101, 1111; *Lonza Inc. v. United States,* 849 F. Supp. 51, 61 (1994), *aff'd,* 46 F.3d 1098 (Fed. Cir. 1995).

The Court believes that if Congress intended to distinguish between "rigid" or "non-rigid" plastics at the eight digit level in Chapter 42, Congress would have inserted those words directly in the statute, as it did in section 4202.12.20[11] and in various provisions of Chapter 39 that explicitly require rigidity or flexibility. *See, e.g.,* HTSUS 3920.41.00; 3920.42; 3920.51.10; 3920.63.10; and 3921.90.40.

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[11] 4202.12.20, HTSUS, provides two categories under the subheading "with outer surface of plastics:" the first is "Structured, *rigid* on all sides" and the second is "Other." (Emphasis added).

CONCLUSION

The distinction between HTSUS subheadings 4202.32.10 and 4202.32.20 does not depend upon the "rigidity" of the plastics, but on whether the plastics have been reinforced or laminated with other materials; those reinforced or laminated are covered by subheading 4202.32.10, HTSUS, and those that are not are covered by subheading 4202.32.20, HTSUS.

Accordingly, Plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted. Judgment shall be entered accordingly.

(Slip Op. 96–141)

UNITED STATES, PLAINTIFF *v.* SNUGGLES, INC., D/B/A ROYAL WATERBEDS, INC., DEFENDANT

Court No. 94–08–00492

[Plaintiff's motion for partial judgment granted. Defendant's cross-motion for partial summary judgment denied.]

(Decided August 20, 1996)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director; *Laurel A. Loomis,* Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice; *Jeffrey Reim,* U.S. Customs Service, Of counsel, for Plaintiff.

Michael S. O'Rourke (Rode & Qualey), for Defendant.

OPINION

POGUE, *Judge:* Plaintiff, the United States Customs Service ("Customs"), invokes the Court's jurisdiction under 28 U.S.C. § 1582(1) (1994) to collect civil penalties and customs duties concerning certain merchandise imported by defendant Snuggles, Inc. ("Snuggles") in violation of 19 U.S.C. § 1592(a) (1994).[1] Customs' claims are before the Court for review pursuant to 28 U.S.C. § 2640(a)(6) (1994) on cross motions for partial summary judgment. The first question presented is whether plaintiff may assess a non-revenue based civil penalty, i.e. a penalty based on the value of the merchandise pursuant to 19 U.S.C. §§ 1592(c)(2)(B) or 1592(c)(3)(B), when it is also collecting lost duties. The second question is whether plaintiff should credit overpayments of

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[1] 19 U.S.C. § 1592(a) provides

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

duties made by defendant, in order to offset duties owed by defendant. The Court grants partial summary judgment to the plaintiff on both issues and denies defendant's motion.

BACKGROUND

Defendant imported and then sold to retailers various waterbed related products from the Republic of Taiwan ("Taiwan") between November 23, 1985 and May 4, 1987. During that period, defendant made 37 entries. Incorrect documentation accompanying the merchandise deprived the United States of lawful duties. Customs seized defendant's entries and subsequently initiated an administrative penalty case. The parties were unable to agree on a settlement for the duties owed and the associated penalties. Defendant refused to pay the penalty imposed, and the United States initiated this action. The parties have not reached agreement as to either the level of culpability or the amount of penalty or lost duties owed for the first 24 entries, and have not reached agreement as to the level of culpability for the last 13 entries.

UNDISPUTED FACTS

In the Amended Joint Stipulation submitted to the Court on May 7, 1996, the parties agreed that between October 1985 and May 1987 defendant improperly entered merchandise (waterbed products such as sheets, pillowcases, comforter shells, and polyvinyl chloride waterbed mattresses and liners) from Taiwan into the United States through the ports of Chicago, Seattle, and Los Angeles, in violation of 19 U.S.C. § 1592. Stip. ¶¶ 2, 3, 4, 8. Defendant incorrectly represented the quantity of merchandise being imported, incorrectly described the merchandise, misstated prices, and failed to provide Customs with proper visas. Stip. ¶¶ 8, 10. The first 24 of the 37 entries in question were subject to quota restrictions, which defendant violated. Stip. ¶ 6. On 15 of these first 24 entries, defendant also understated the price of some merchandise and overstated the price of other merchandise, resulting in simultaneous overpayments and underpayments of duties. Stip. ¶ 14. Customs' revenue loss calculations did not offset the amount defendant overpaid against the amount that defendant underpaid on these 15 entries. Stip. ¶ 15.

Customs' calculation of the actual loss of revenue resulting from defendant's misstatement of the price of the 24 entries, $48,496.91, is correct if defendant is not entitled to offset the overpayments and underpayments. Stip. ¶ 13. On the last 13 of the 37 entries, defendant understated the price, but the merchandise was not subject to quota restrictions. Stip. ¶¶ 17, 18. The amount of lost duties resulting from the violation associated with the last 13 entries is $3,310.52. Stip. ¶ 19. The defendant has not paid any part of the assessed penalties or the lost revenue demanded by Customs. Stip. ¶ 21.

STANDARD OF REVIEW

In actions brought for the recovery of any monetary penalty claimed under section 592 of the Trade Act of 1930, as amended, 19 U.S.C. § 1592

(1994), all issues are tried de novo, 28 U.S.C. § 2640(a)(6), including the amount of the penalty, 19 U.S.C. § 1592(e)(1). *See also United States v. Priority Products, Inc.*, 9 CIT 383, 385, 615 F. Supp. 591, 592 (1985), *aff'd*, 793 F.2d 296 (Fed. Cir. 1986).

The Court finds that there are no genuine issues of material fact, the dispositive issues to be resolved are legal in nature, and, therefore, summary judgment is proper. USCIT R. 56(d).

DISCUSSION

The first question before the Court is whether, with regard to the first 24 entries, plaintiff may assess a non-revenue rather than a revenue-based civil penalty when there is a loss of duties for misstatements of the price of the merchandise. Section 1592 has two relevant subsections: (c), which deals with maximum penalties; and (d), which deals with deprivation of lawful duties.[2] The issue is whether, when lost duties are collected under (d), Customs retains its discretion to choose between revenue-based[3] and non-revenue-based penalties[4] provided under (c). The threshold question on this issue is whether defendant committed separate and distinct violations within single entries.

Plaintiff argues that defendant has committed separate and distinct violations on the first 24 entries and should therefore face the respective penalties for each. Defendant violated the quota restriction on the imported merchandise, introducing the merchandise without the proper visa. See Stip. ¶¶ 6, 8, 10. At the same time, defendant also falsely stated the price of this merchandise, thus lowering the amount of duties assessed. Stip. ¶ 14.

Although Customs may not issue multiple penalties for a single violation, plaintiff asserts that section 1592 does not contain any limitation regarding the number of violations that may be committed with respect to an entry. Thus, plaintiff claims that Customs may collect *separate* penalties for separate violations on the same merchandise. Plaintiff relies on *United States v. F.H. Fenderson, Inc.*, 11 CIT 199, 205, 658 F.

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[2] 19 U.S.C. § 1592(c) (maximum penalties) provides, under gross negligence and negligence:

(2) Gross negligence
A grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—
(A) the lesser of—
(i) the domestic value of the merchandise, or
(ii) four times the lawful duties of which the United States is or may be deprived, or
(B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.

(3) Negligence
A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—
(A) the lesser of—
(i) the domestic value of the merchandise, or
(ii) two times the lawful duties of which the United States is or may be deprived, or
(B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

19 U.S.C. § 1592(d) (deprivation of lawful duties, taxes or fees) provides:

Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, or fees be restored, whether or not a monetary penalty is assessed.

[3] 19 U.S.C. § 1592(c)(2)(A) in the case of grossly negligent violation, 19 U.S.C. § 1592(c)(3)(A) in the case of negligent violation.

[4] 19 U.S.C. § 1592(c)(2)(B) in the case of grossly negligent violation, 19 U.S.C. § 1592(c)(3)(B) in the case of negligent violation.

Supp. 894, 899 (1987) and *United States v. Valley Steel Products Co.*, 15 CIT 269, 270, 765 F. Supp 752, 753 (1991) (Customs may seek a penalty which is greater than the proven loss of revenue because the purpose of the penalty is to remedy a wrong). Furthermore, plaintiff adds, subsection (d) of 19 U.S.C. § 1592 is an independent avenue for the restoration of duties "lost as a result of a violation of subsection (a) [which] are recoverable by the United States 'whether or not a monetary penalty [pursuant to subsection (a)] is assessed.'" *United States v. Blum*, 858 F.2d 1566, 1569 (Fed. Cir. 1988) (citing section 1592(d), and reversing 11 CIT 316, 660 F. Supp. 975 (1987) on the same issue). "The statutory scheme provides the United States with means both (1) to impose a penalty for improper conduct *and* (2) to recover import duties lost as a result of the improper conduct." *Id.*

Defendant counters that the act of importing constituted a single violation with both revenue and non-revenue consequences. Defendant claims that once Customs determines that there is a loss of revenue for an entry, it is precluded from using a percent of the dutiable value of the merchandise, i.e., a non-revenue penalty, as the basis of a civil penalty on that entry. The statute, according to defendant, does not grant Customs the option to choose which of the two penalty formulas (revenue-based or non-revenue based) to impose.[5] Defendant objects that plaintiff's reliance on *Fenderson*, *Valley Steel*, and *Blum* is misplaced because in each of these cases separate and distinct defendants committed separate and distinct violations, as opposed to the single defendant in this action who committed one act resulting in one violation with both revenue and non-revenue facets. Defendant agrees that civil and criminal penalties can arise from the same act against a single individual, and also that more than one party can be held liable for actions arising out of a single entry. However, defendant claims that plaintiff's precedents are distinguishable based either on the number of participants involved or on the fact that they involved criminal acts rather than the civil acts involved here.[6]

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[5] Defendant argues that the Customs Procedural Reform and Simplification Act of 1978 and the associated changes in section 1592 evidence clear Congressional intent to restructure the penalty provision, so that it is only when no loss of revenue occurs that a penalty may be enforced based on a percentage of the appraised value of the merchandise. Defendant claims that assessing multiple penalties would run contrary to Congressional intent in amending section 1592. In 1978 in his appearance regarding the proposed changes to § 1592, Customs Commissioner Robert E. Chasen said to the Senate Subcommittee on International Trade:

> "The initial penalty would no longer be equal to the full forfeiture value of the merchandise. Instead, it would be equal to a multiple of the loss of revenue, or, if no revenue loss is involved, a percentage of the appraised value of the merchandise."

[6] Defendant's argument is different from the one raised in *United States v. Ziegler Bolt and Parts Co.*, slip op. 95–3 (Ct. Int'l Trade, Jan. 13, 1995). In that case, the defendant attempted to rely on *United States v. Halper*, 490 U.S. 435 (1989) (the Government may not impose a criminal penalty and then bring a separate civil action based on the same conduct and impose a civil penalty which is disproportionate to the damages caused) to support the argument that imposition of civil penalties exposed defendant to double jeopardy, in violation of the Fifth Amendment to the United States Constitution. In *Ziegler*, the Court held that an "action to recover civil penalties under 19 U.S.C. § 1592 does not violate the Double Jeopardy Clause of the United States Constitution because penalties under section 1592 amount to a form of liquidated damages which the court may discretionally assign." *Ziegler*, slip op. 95–3 at 9; *see also Valley Steel*, 14 CIT at 17, 729 F. Supp. at 1359 (footnote omitted) and *United States v. Dantzler Lumber & Export Co. et al.*, 16 CIT 1050, 1056–57, 810 F. Supp. 1277, 1283–84 (1992). *Cf. United States v. Ursery*, 1996 WL 340815 at 9, *to be reported at* 116 S. Ct. 2134 (1996) ("[I]n rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause.")

Thus, defendant maintains that the amount of the civil penalty in this case must be calculated on a "loss of revenue basis" pursuant to subsection 1592(c)(2)(A) (gross negligence) or subsection 1592(c)(3)(A) (negligence). As a result, the penalty for defendant's improper visas should be limited to a multiple of the duties lost as a result of defendant's undervaluation.[7] Defendant relies on *TIE Communications, Inc. v. United States,* slip op. 94–72 (Ct. Int'l Trade, May 5, 1994) where the court found that "the true significance of subsection (d) is merely to contrast the discretion with which a Customs officer can mitigate a timely brought action on penalties against that officer's lack of discretion to mitigate lawfully owed duties that are discerned as a result of the same timely brought action for * * * fraud, gross negligence or negligence." *Id.* at 15. This, defendant claims, illustrates the fact that Customs does not have discretion in determining which penalty to use under 19 U.S.C. § 1592(c) when a loss of revenue is involved.[8]

The Court finds defendant's arguments unconvincing and contrary to the court's interpretation of section 1592. There is nothing in the language of subsections 1592(c) or (d) which supports defendant's interpretation.

Prior to the enactment of the Customs Procedural Reform and Simplification Act of 1978, if a court determined that a violation of section 592 had occurred, it had no option but to enforce the penalty for forfeiture of the goods in question.[9] The statute now provides for three categories of penalty assessments, depending on the level of culpability: fraud, gross negligence, or negligence. 19 USC § 1592(c). Although "a defendant in a section 1592 action may be forced to pay the greatest penalty applicable under that provision even if his unlawful conduct did not result in any loss of revenue to the United States * * *. the legislative history makes clear that an important motivation for amending section 1592 was Congress' desire to alleviate the harsh consequences of the forfeiture penalty." *United States v. Gordon,* 10 CIT 292, 297, 634 F. Supp. 409, 415 (1986).

By replacing the forfeiture with varying monetary penalties, Congress has introduced a remedial purpose into section 1592.[10] This court has clarified that both punitive and remedial purposes characterize section 1592. "[T]he penalty imposed under section 1592 differs with the degree of scienter or culpability of the defendant * * *. [which] is essential to retribution, a principle of punishment rather than of civil damages." *Gordon,* 10 CIT at 297, 634 F. Supp. at 414–15 (1986); *see also United States v. Modes, Inc.,* 17 CIT 627, 635–36, 826 F. Supp. 504, 512

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[7] Defendant cites *United States v. Jac Natori,* slip op. 95–126 at 12 (Ct. Int'l Trade, July 14, 1995) (imposing a loss of revenue penalty for defendant's grossly negligent actions which included improper visas).

[8] Defendant also contends that plaintiff is attempting to impose a "primary result" test that is not written in the statute, and that Customs Regulations, 19 CFR § 171, App. B differentiate between "revenue-loss violations" and "non-revenue-loss violations" but do not contain a "primary result" standard.

[9] Pub. L. No. 95–410, Title I, Sec. 110(a), 92 Stat. 888, 893–97 (1978). *See* S. Rep. No. 778, 95th Cong., 2d Sess. 18–19, *reprinted in* 1978 U.S.C.C.A.N. 2211, 2213, 2230–31; *see also United States v. One Red Lamborghini,* 10 CIT 7, 11, 625 F. Supp. 986, 989 & n.6 (1986).

[10] *See generally Helvering v. Mitchell,* 303 U.S. 391, 397–98 (1938) (a civil action by the Government is usually remedial in nature).

(1993). "On the other hand, section 1592 has a remedial effect as well* * *. This remedial function was bolstered by the amendment of section 1592 which, as noted, now links, under certain circumstances, the penalty imposed to the lawful duties of which the United States was deprived." *Gordon,* 10 CIT at 297, 634 F. Supp. at 415.

As this court held in *United States v. Valley Steel Products Co.,*15 CIT 268, 270, 765 F. Supp. 752, 753 (1991), the purpose of this penalty is not just to replace lost levies, but to remedy a wrong, whether or not that wrong can be traced to precise revenue losses. Furthermore, this court has consistently held that Customs can "assess separate penalties for separate violations on the same merchandise." *Fenderson,* 11 CIT at 205, 658 F. Supp. at 899. The parties have stipulated that defendant violated the quota restrictions and also falsely stated the price of the merchandise. Stip. ¶¶ 6, 8, 10, 14. Therefore, defendant committed separate violations on the same entries. Subsections 1592(c) and (d) clearly contemplate non-revenue and revenue based penalties for these separate violations.

This result does not contrast with the result in *TIE Communications,* slip op. 94–72 (Ct. Int'l Trade, May 5, 1994) cited by defendant. In *TIE,* the issue was whether the statute of limitations applied to both subsections 1592(a) and 1592(d) in the same way. Thus, defendant's reading of *TIE* is out of context and inapposite to the case presented by the parties.

Moreover, the fact that a revenue loss resulted from one violation does not preclude assessment of a non-revenue based penalty for a separate, non-revenue violation on the same entry, such as the visa violation in the instant case. The Federal Circuit has made it clear that Customs can both impose a penalty and request unpaid duties. *Blum,* 858 F.2d at 1569. Defendant's interpretation that the assessment of the non-revenue penalty and the restoration of unpaid duties cannot be applied to the same entry would eviscerate the non-revenue provisions of the statute. To allow subsection 1592(d) to preclude the application of the non-revenue penalties in subsection 1592(c) would defeat the statutory purpose of promoting correct reporting of the quantity of imported goods, and could result in the assessment of trivial penalties for serious non-revenue violations whenever a violator could demonstrate some nominal underpayment of duties on the same entry.

Finally, other considerations support plaintiff's position. For the first 24 entries plaintiff is not seeking to impose both a penalty for the non-revenue violations as well as a penalty based on the loss of revenue. For the first 24 entries, plaintiff is only seeking a penalty for the *non-revenue* violation of the visa requirement. For the last 13 entries plaintiff is seeking a loss of revenue penalty because there was no non-revenue violation. Thus, plaintiff's claim does not exceed the statutory ceiling represented by the domestic value of the merchandise.[11]

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[11] The legislative history of Section 1592, and particularly the 1978 revisions softening the harshness of the forfeiture requirement, indicate Congressional intent that penalties and duties imposed should not exceed the domestic value of the goods in question. *See also Jac Natori,* slip op. 95–126 at 12 ("The plaintiff should be awarded * * * which sum the record indicates is less than the domestic value of the goods to which the duties apply.")

In the case of separate violations, the choice of whether to pursue both penalties, non-revenue and revenue-based, or only one of them, and which one, is within Customs' discretion. Multiple provisions generally give Customs discretion in assessing a penalty. For example, section 1618 provides that Customs "may [assess penalties] that [it] deems reasonable and just." Customs *may* choose to propose a fixed penalty not related to the value of the merchandise but believed sufficient to have a deterrent effect for violations "where the loss of revenue is nonexistent or minimal."[12]

Consequently, on the first question presented, the Court concludes that plaintiff may assess a non-revenue-based penalty for defendant's violation of the quota restrictions and visa requirements.

The second question before the Court is whether defendant's overstatements and understatements within the same entry may be "offset" so as to reduce the total amount owed to Customs.

Plaintiff claims that defendant is not entitled to a 'credit' for overpayment of duties. Overstating the price of some merchandise, plaintiff argues, is irrelevant to the application of subsection (d) to defendant's undervaluation. Moreover, to allow a 'credit' would provide violators of section 1592 a benefit unavailable even to non-violators who may have inadvertently overpaid duties.

Defendant counters that the offsets should be allowed, thereby reducing the total loss of revenue violations, because the overpayments and underpayments were made within the same entry. As support for this proposition, defendant cites Treasury Decision 79–160 (13 Cust. Bull. 398 (1979)), effective June 4, 1979, which includes a proposal to expand the definition of "actual loss of duties" included in 19 CFR § 162.71 "to provide that, for purposes of assessing any penalty, the actual loss of duties shall be reduced by the amount of any erroneous overpayment of duties by the alleged violator." 13 Cust. Bull. at 403. The proposal was not adopted because Customs did not believe that the Act could be construed to reduce the actual loss of duties resulting from underpayments by offsetting them with overpayments on *different* entries. *Id.* at 403–404. However, because the defendant seeks to offset overpayments and underpayments within a *single* entry, the defendant claims that the reasoning of the unadopted proposal applies and therefore the offsets should be allowed.[13]

Defendant's claim is without merit. In fact, defendant did not file a protest requesting a correction of its overpayments.[14] Inasmuch as defendant failed to take the requisite steps to secure a correction, the

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[12] 19 CFR § 171, App. B (C)(1)(c) (1995).

[13] The Treasury Decision addressed a net overpayment on a particular entry, not a reduction of a net underpayment on that entry. The Treasury Decision does not mention that there would be any sort of 'credit' or refund for the overpayment, merely that there would be no duties owed on the entry in which there was an overpayment.

[14] 19 USC § 1514(a)(5) (1994) (Protest against decisions of the Customs Service) provides:

(a) Finality of decisions; return of papers

[D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

* * * * * * *

Continued

decisions of Customs officers as to value, classification, rate, and amount must stand as final and conclusive as far as those importations are concerned. *Dooley v. United States*, 182 U.S. 222, 223 (1901); *United States v. Uniroyal, Inc.*, 687 F.2d 467, 471 (CCPA 1982) (Congress did not intend the CIT to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service); *United States v. Utex Int'l, Inc.*, 857 F.2d 1408, 1412 (Fed. Cir. 1988).[15]

In a similar, more recent case, the defendant argued that there were instances in which the defendant under-shipped merchandise, and that, if "netted out," the quantities would be even or less than what defendant declared. *Jac Natori*, slip op. 95–126 at 10. The court rejected defendant's claim and ruled that "whatever the precise arithmetic, it in no way negates the fact that [defendant] knowingly misdeclared merchandise on the entry documents and did not obtain visas for all of the goods." *Id.*

Consequently, the Court will award Customs, in addition to the civil penalty, the unpaid duties owed because of defendant's under-reporting. The statute provides that "if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs service shall require that such lawful duties, taxes, or fees shall be restored, whether or not a monetary penalty has been assessed." 19 U.S.C. § 1592(d). Unlike civil penalties, an award of lost duties is not discretionary.

CONCLUSION

For the foregoing reasons, the Court grants plaintiff's motion for partial judgment and denies defendant's cross-motion for partial summary judgment. The parties are hereby directed to present to the Court a proposed stipulated judgment within thirty days, or request a trial.

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(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;

* * * * * * * *

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.

In cases not involving fraud, "[a] protest of a decision, order, or finding * * * shall be filed with such customs officer within 90 days after but not before—(A) notice of liquidation or reliquidation * * *" 19 U.S.C. § 1514(c)(2)(A). Where a protest is filed more than 90 days after notice of liquidation, the Court does not have jurisdiction over an action contesting the denial of such protest. 28 U.S.C. § 1581(a); 19 U.S.C. § 1514(c)(2). *See Star Sales & Distributing Corp. v. United States*, 10 CIT 709, 663 F. Supp. 1127 (1986); *see also Gulbenkian v. United States*, 186 F. 133 (C.C.A.2 N.Y.) (1911).

[15] Congress did not intend to allow any other mode to redress an alleged wrong in the operation of the laws for the correction of duties on imported merchandise. *Nichols v. United States*, 74 U.S. 122 (1868).

(Slip Op. 96–142)

GERALD METALS, INC., PLAINTIFF *v.* UNITED STATES, U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANT, AND MAGNESIUM CORP. OF AMERICA, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 564, AND UNITED STEEL WORKERS OF AMERICA, LOCAL 8319, DEFENDANT-INTERVENORS

Court No. 95–06–00782

[ITC final determination of material injury sustained. Plaintiff's motion denied. Action dismissed.]

(Decided August 21, 1996)

Frederick P. Waite, Joseph Brooks, Denise Cheung (Popham, Haik, Schnobrich & Kaufman, Ltd), Counsel for Plaintiff.

Lyn M. Schlitt, General Counsel; *James A. Toupin,* Deputy General Counsel; *Andrea C. Casson,* Attorney for Defendant, Office of the General Counsel, U.S. International Trade Commission.

Charles M. Darling, IV, Michael X. Marinelli (Baker & Botts, L.L.P.), Attorneys for Defendant-Intervenors.

OPINION

POGUE, *Judge:* This case is before the Court on a motion for judgment upon the agency record pursuant to USCIT R. 56.2. Plaintiff Gerald Metals, Inc. ("Gerald Metals") brings this action under section 516A of the Tariff Act of 1930 for review of the final affirmative determination of the United States International Trade Commission ("Commission") that less-than-fair-value ("LTFV") imports of pure magnesium from Ukraine are causing material injury to the domestic industry.[1] *Magnesium from China, Russia, and Ukraine,* 60 Fed. Reg. 26,456–57 (Int'l Trade Comm'n, May 17 1995) (final). The Commission's opinion is set forth in *Magnesium from China, Russia, and Ukraine,* USITC Pub. 2885, Inv. Nos. 731–TA–696–698 (May 1995) ("Determination").[2] The Court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994) and affirms the Commission's finding of material injury.

BACKGROUND

On March 31, 1994, Magnesium Corporation of America, International Union of Operating Engineers, Local 564, and United Steelworkers of America, Local 8319, filed an antidumping petition under section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b (1988),[3] alleging material injury by reason of LTFV imports of pure and alloy

[1] Gerald Metals is a metals trading company which imports, among other products, pure magnesium from Russia and Ukraine into the United States.

[2] List 1, Doc. 106; List 2, Doc. 42. List 1 consists of the documents within the public portion of the record made before the Commission. List 2 consists of the documents within the confidential portion of the same record.

[3] The Uruguay Round Agreement Act ("URAA"), Pub. L. No. 103–465, tit. II, 108 Stat. 4809, 4842 (1994), amended the antidumping laws. These amendments, however, do not apply to investigations initiated before January 1, 1995, *id.* at § 291(a)(2), (b), which are thus regulated by the pre-existing law. Accordingly, this Court refers to the antidumping statute in effect prior to January 1, 1995. For simplicity, the Court speaks in the present tense when referring to the pre-existing statute.

magnesium from China, Russia, and Ukraine. In its preliminary determination, the Commission found reasonable indication of material injury to an industry in the United States because of imports of magnesium from the subject countries.[4] On June 22, 1994, The Dow Chemical Company ("Dow") joined the petitioners.

The United States Department of Commerce, International Trade Administration ("Commerce") issued preliminary determinations that imports of magnesium from the three subject countries were being sold at less than fair value within the meaning of section 733(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673b(b) (1988). The Commission then instituted its final investigations.[5] On March 30, 1995, Commerce published final determinations of LTFV sales for imports of magnesium from all three subject countries.[6]

On May 17, 1995, the Commission published its final determinations in its investigations of imports of pure and alloy magnesium.[7] The Commission determined that the domestic pure magnesium industry was materially injured by reason of LTFV imports of pure magnesium from China, Russia, and Ukraine.[8] Three commissioners, Chairman Watson, Vice Chairman Nuzum, and Commissioner Crawford dissented, and each filed dissenting views. The Commission also unanimously determined that the domestic alloy magnesium industry was not materially injured or threatened with material injury by reason of LTFV imports of alloy magnesium from China and Russia.[9]

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[4] *Magnesium From the People's Republic of China, Russia, and Ukraine*, 59 Fed. Reg. 27,297 (Int'l Trade Comm'n, May 26, 1994) (preliminary). However, in its preliminary determination the Commission excluded imports of alloy magnesium from Ukraine.

[5] *Magnesium from the People's Republic of China, Russia, and Ukraine*, 59 Fed. Reg. 63,105 (Int'l Trade Comm'n, December 7 1994) (notice).

[6] *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium from Ukraine*, 60 Fed. Reg. 16,432 (March 30, 1995); *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the People's Republic of China*, 60 Fed. Reg. 16,437 (March 30, 1995); *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 Fed. Reg. 16,440 (March 30, 1995).

Commerce assigned margins ranging from 79.87 to 104.27 percent to subject imports from Ukraine, from zero to 100.25 percent to subject imports from Russia, and 108.26 percent to subject imports from China. Sales of Russian pure and alloy magnesium through Gerald Metals were assigned a LTFV margin of zero. 60 Fed. Reg. at 16,449–50.

[7] *Magnesium from China, Russia, and Ukraine*, 60 Fed. Reg. 26,456–57 (Int'l Trade Comm'n, May 17, 1995) (final).

[8] *Id.* at 18–22. Pure magnesium encompasses: (1) products that contain at least 99.95 percent primary magnesium, by weight (generally referred to as "ultra pure" magnesium); (2) products containing less than 99.95 prcent but not less than 99.8 percent primary magnesium, by weight (generally referred to as "pure" magnesium); and (3) products (generally referred to as "off-specification pure" magnesium) that contain 50 percent or greater, but less than 99.8 percent primary magnesium, by weight, and that do not conform to ASTM specification for alloy magnesium. "Off-specification pure" magnesium is pure primary magnesium conaining magnesium scrap, secondary magnesium, oxidized magnesium or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8 percent by weight. It generally does not contain, individually or in combination, 1.5 percent or more, by weight, of the following alloying elements: aluminum, manganese, zinc, silicon, thorium, zirconium, and rare earths. *Id.* at 3 n. 3, and 6. Pure magnesium is provided for in subheading 8104.11.00 of the Harmonized Tariff Schedule of the United States ("HTSUS").

[9] *Id.* at 23–26. Gerald Metals does not seek review of this determination.

Alloy magnesium contains 50 percent or greater, but less than 99.8 percent, primary magnesium, by weight, and one or more of the following: aluminum, manganese, zinc, silicon, thorium, zirconium, and rare earths, in amounts which, individually or in combination, constitute not less than 1.5 percent of the material, by weight. Products that meet the aforementioned description but do not conform to ASTM specifications for alloy magnesium are not included in the definition of alloy magnesium. In addition to primary magnesium, alloy magnesium may contain magnesium scrap, secondary magnesium, or oxidized magnesium in amounts less than the primary magnesium itself. *Id.* at 3 n. 4, and 6–7. Alloy magnesium is provided for in subheading 8104.19.00, HTSUS

This action presents the following issues:

1. Whether the Commission considered the existence of fairly-traded imports of pure magnesium from Russia, available to domestic consumers at prices comparable to those of LTFV imports, and whether the existence of such fairly-traded imports should have precluded a finding that dumped imports were a cause of injury to the domestic industry?
2. Whether the Commission properly determined that Dow closed one of its magnesium plants because of the subject imports?
3. (a) Whether the Commission properly decided to close the period of investigation in June 1994 when the subject imports decreased?

(b) Whether the tight supply conditions which occurred in the domestic market during 1994 and the first quarter of 1995 preclude a finding of present material injury to the domestic industry by reason of subject imports?

STANDARD OF REVIEW

The Court will uphold a Commission determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951); *Matsushita Elec. Indus. Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). "The court is not empowered to substitute its judgment for that of the agency." *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1970); *see also Matsushita,* 750 F.2d at 936. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted); *Matsushita,* 750 F.2d at 936.

DISCUSSION

1. *Did the Commission consider fairly-traded imports from Russia, and does their existence preclude a finding of material injury?*

Vice Chairman Nuzum, in her dissenting views, found that "a sizeable portion of the imports from Russia were fairly traded. These imports undersold domestic product almost as frequently as did LTFV imports."[10] Similarly, dissenting Commissioner Crawford noted that "[d]umped Russian imports and fairly traded Russian imports are very close, if not perfect, substitutes."[11]

Plaintiff contends that the Commission did not consider fairly-traded imports of pure magnesium from Russia, nor their impact on the domestic market. Plaintiff avers that record evidence shows that such imports

[10] *Determination* at 35 (Vice Chairman Nuzum, dissenting views) (citing Table 24, CR at I–45, PR at I–26; Table 25 and 26, CR at I–57, I–60, PR at I–31–32) (List 1, Doc. 106).

[11] *Determination* at 45 (Commissioner Crawford, dissenting views) (List 1, Doc. 106).

were no different from the dumped Russian imports in product quality, price, terms, and conditions of sale.[12] The only difference between fairly-traded Russian imports and LTFV Russian imports is that they are not traded by the same trading companies; some trading companies were assigned zero margins and others were assigned a margin of 100.25 percent.[13] Plaintiff argues that if LTFV Russian imports had been removed from the domestic market, then fairly-traded Russian imports would have expanded to fill the market share left by LTFV Russian imports. Consequently, plaintiff claims, even in the absence of LTFV imports, the injury to the domestic industry would have been the same.

The thrust of plaintiff's argument is that there is no causal nexus between LTFV imports from Ukraine and material injury to the domestic industry. LTFV imports from China, Ukraine and Russia were found to compete directly in the market, and to be close substitutes. Plaintiff maintains that, absent any LTFV imports, domestic consumers would have purchased fairly-traded Russian imports, which would have replaced LTFV imports from China and Ukraine in the same way they would have replaced LTFV Russian imports.[14] This demonstrates, according to plaintiff, that subject imports did not cause any material injury to the domestic industry.[15] Instead, plaintiff complains, the Commission erroneously concluded that domestic product would have replaced all the subject imports.[16]

Defendant preliminarily objects that this claim was not raised before the Commission, and that plaintiff is estopped from raising it.[17] However, the rule of exhaustion of administrative remedies is neither abso-

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[12] Reporting from Commissioner Crawford's dissenting view, *Determination* at 45 (List 1, Doc. 106).

[13] Commerce assigned zero margins to pure magnesium imported through trading companies who submitted sufficient responses, and a margin of 100.25 percent to all other trading companies who did not respond, cooperate or have sales during the period of investigation. *Memorandum INV-S–055* (List 2, Doc. 36). *See also Determination* at 47 (Commissioner Crawford, dissenting views) (List 1, Doc. 106).

[14] *Determination* at 20 (List 1, Doc. 106). "[T]here is no apparent reason why LTFV pure magnesium from China and Ukraine, if removed from the domestic market, would not also have been replaced with fairly-traded Russian magnesium." Plaintiff's Brief in Support of Rule 56.2 Motion at 23.

[15] Even if the Russian fairly-traded imports would have replaced only the Russian LTFV imports, Gerald Metals argues that there would be no impact from subject imports because the volume of subject imports from China and Ukraine is not significant.

[16] Plaintiff's argument follows the one-step analysis, which recreates what the industry would look like in the absence of the LTFV imports, and then compares that situation to the domestic industry as it exists. This analysis isolates the effects of the subject imports from other factors which might be causing injury to the domestic industry. *See generally U.S. Steel v. United States*, 18 CIT ___, 873 F. Supp. 673, 694–95 (1994), *appeal docketed*, No. 95–1245 (Fed. Cir. Feb. 24, 1995). The alternative two-step analysis starts with examining whether the industry is injured; if the answer is in the affirmative, the second step will examine whether the LTFV imports are a non-de minimis cause of that injury. *Id.*

Plaintiff does not claim that the one-step analysis *should* apply, but that consideration of the one-step analysis reveals a fundamental flaw in the Commission plurality's treatment of causation, i.e., the industry would have been the same had the LTFV imports not been present. (Plaintiff's Reply Brief at 6.) Defendant-intervenors claim that plaintiff's argument about the outcome of a one-step analysis is weakened by the *Final Economic Memorandum*, a part of the administrative record which utilized the one-step analysis, and reached the same causation conclusion as the final determination.

It is within the Commission's discretion to choose a reasonable causation analysis. *See Negev Phosphates, Ltd. v. United States Department of Commerce*, 12 CIT 1074, 1089, 699 F. Supp. 938, 951 (1988) (citing *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1050–51, 700 F. Supp. 538, 558 (1988)) ("[T]he Commission has discretion in its choice of reasonable analytical methodologies.").

[17] Defendant cites *Ceramica Regiomontana S.A. v. United States*, 14 CIT 706, 708 (1990); *Cemex, S.A. v. United States*, 16 CIT 251, 258 (1992), *aff'd*, 989 F.2d 1202 (Fed. Cir. 1993); *Wieland Werke, AG v. United States*, 13 CIT 561, 567, 718 F. Supp. 50, 55 (1989); *Holmes Products Corp. v. United States*, 16 CIT 1101, 1104 (1992); *Timken Co. v. United States*, 11 CIT 786, 789 (1987); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *PPG Industries, Inc. v. United States*, 14 CIT 522, 542 (1990).

lute nor inflexible, *see* 28 U.S.C. § 2637(d) (1994) (the court "shall, *where appropriate,* require the exhaustion of administrative remedies") (emphasis provided). Various exceptions have been articulated by this court. In this case, the Court will entertain the claim because the agency had an opportunity to consider the issue. *Holmes Products Corp. v. United States,* 16 CIT 1101, 1103–04 (1992). *See also Ceramica Regiomontana, S.A. v. United States,* 14 CIT 706, 708 (1990). The issue of the fairly-traded imports was discussed during the Commission's hearing,[18] and was also considered by the dissenting Commissioners.[19] Consequently, the rule of exhaustion of remedies does not apply here.

On the merits, the Commission correctly considered volume/price effects of LTFV imports, after the data reflecting fairly-priced imports had been separated from the data on LTFV imports.[20] The Commission found material injury by reason of LTFV imports.

Record evidence supports the fact that the Commission did consider the fairly-traded imports. As noted above, the issue was discussed at the Commission's hearing. Upon request by some Commissioners, the Office of Investigations transmitted to the Commission a memorandum which explained the result of the investigation with regard to fairly-traded Russian imports.[21] Moreover, the Commission is presumed to have considered all relevant evidence on the administrative record.[22] The Commission considered the presence and effects of fairly-traded Russian imports; therefore, its determination is in accordance with law.[23]

Plaintiff relies on the assumption that fairly-traded Russian imports would replace all or the greatest part of the subject imports. The record

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[18] *See Transcript of Proceedings* at 120–30 (List 1, Doc. 73).

[19] *Determination* at 28–29 (dissenting views of Chairman Watson) (List 1, Doc. 106); *id.* at 35–36 (dissenting views of Vice Chairman Nuzum); *id.* at 42, 44–50 (dissenting views of Commissioner Crawford).

[20] *Staff Report,* Tables 23 and 24 (List 2, Doc. 37 at I–46–49). *See Algoma Steel Corp. v. United States,* 12 CIT 518, 523, 688 F. Supp. 639, 645 (1988) (explaining that ITC must establish "what effect imports in a class of merchandise sold at LTFV have on the domestic industry producing the 'like' product"), *aff'd,* 865 F.2d 240, 242 (Fed. Cir. 1989) (holding that once Commerce determines that a class or kind of goods was being sold at LTFV, the ITC is not required to pursue details and break down the LTFV sales from the MTFV ones, even though MTFV sales might be considered, in some particular cases, if relevant to the injury determination); *USX Corp. v. United States,* 12 CIT 205, 219, 682 F. Supp. 60, 73 (1988) (arguing that antidumping law "require[s] a causal link between unfairly traded imports and material injury to domestic industry;" however, the requirement that cumulated imports be unfairly traded does not mean that "all imports cumulated be causes of material injury if considered independently;" only LTFV imports "should be candidates for cumulation").

[21] *Memorandum INV-S-055* (List 2, Doc. 36).

[22] Lack of discussion of issues does not mean that the Commission failed to consider them. *Grupo Indus. Camesa v. United States,* 18 CIT ___, 853 F. Supp. 440, 445 (1994) (holding that ITC is not required to issue findings and conclusions simply because the party presented them), *aff'd,* 85 F.3d 1577 (Fed. Cir. 1996); *Connecticut Steel Corp. v. United States,* 18 CIT ___, 852 F. Supp. 1061, 1065 (1994); *Granges Metallverken AB v. United States,* 13 CIT 471, 478, 716 F. Supp. 17, 24 (1989) (explaining that absence of discussion of an issue in the determination "does not establish that the Commission failed to consider that information because there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties* * *. The Commission is presumed to have considered all of the evidence in the record, especially where the facts allegedly ignored were presented at an open hearing").

[23] At oral argument, Gerald Metals contended that, under *USX Corp. v. United States,* 11 CIT 82, 655 F. Supp. 487 (1987), an insufficient record amounts to a procedural error. The Court disagrees with plaintiff's interpretation of *USX.* That case was remanded because the Commission's determination was unsupported by substantial evidence, *id.* at 491, 498. The Court does not need to reach the question raised by Gerald Metals because it concludes that the record is sufficient.

shows no evidence supporting this claim.[24] The Commission found that subject imports from different countries competed with each other and with like domestic products, and the Commission cumulatively assessed the volume and effect of those imports.[25] The Commission evaluated all relevant economic factors regarding the imports, and found that LTFV imports of pure magnesium from China and Ukraine were not negligible and had a discernable adverse impact on the domestic industry.[26] The investigations reported rapid and significant increase in the volume of LTFV imports, persistent underselling by the LTFV imports, decline in the domestic industry's production and sales, loss of the domestic industry's market share, and poor financial condition of the domestic industry during the period of investigation.[27] Substantial evidence on the record corroborates the Commission's determination that the domestic industry was materially injured by reason of the LTFV imports from Ukraine.

Contrary to plaintiff's representation, the Commission did not conclude that "all subject imports eliminated from the domestic market would have been replaced with domestic product."[28] Rather, the Commission established that "U.S. producers should have been able to raise their prices for pure magnesium without sacrificing a significant amount of sales volume."[29] Even though fairly-priced imports may have been *another* cause of injury, the Commission has a statutory obligation not to weigh causes.[30] Thus, it correctly did not compare the impact of subject imports to the impact of other factors, like the fairly-traded imports.

The foregoing discussion also answers plaintiff's argument that the imposition of antidumping duties in this case would not be remedial, but penal.[31] To the extent that antidumping duties afford a prospective relief to the domestic industry, which would otherwise be further

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[24] Indeed, the LTFV imports at issue here are from Ukraine, whereas plaintiff's hypothetical centers on the Russian imports. Even in a perfectly competitive market, producers and consumers' decisions are driven not only by the quality and price of the product itself (which in this case is proven to be more or less the same in Ukraine and in Russia) but also by other considerations. For example, the Commission found in the purchasers' questionnaire responses that their decision from whom to purchase is influenced by various factors, like contract terms, service, warranties, sales techniques, delivery, credit terms, etc. *See Determination* at I–33 (List 1, Doc. 106); *Conf. Determination* at I–63 (List 2, Doc. 42). Plaintiff's argument assumes that a producer would automatically switch to different importers trading at fair value in the same way as domestic consumers would automatically switch to different trading companies in buying pure magnesium. Plaintiff's assumption is not persuasive, not only because it is not verified, but also because it is contradicted by the record.

[25] *Determination* at 15–16 (List 1, Doc. 106). *See* 19 U.S.C. § 1677(7)(C)(iv) (1988).

[26] *Id. See* 19 U.S.C. 1677(7)(C)(v) (1988). *See also Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 1018–19, 728 F. Supp. 730, 735 (1989) (concluding that "[t]he Commission has broad discretion to ascertain which economic factors are relevant in an investigation, and the weight to be given those factors.").

[27] *Determination* at 19–22 (List 1, Doc. 106).

[28] Plaintiff's Brief at 23. At oral argument, plaintiff reiterated this assertion.

[29] *Determination* at 22 (citing *Economic Memorandum* at 14–15) (List 1, Doc. 106).

[30] *See* S. Rep. No. 249, 96th Cong., 1st Sess 57 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 46–47 (1979). *See also Encon Industries, Inc. v. United States*, 16 CIT 840, 841 (1992); *Citrosuco Paulista v. United States*, 12 CIT 1196, 1228, 704 F. Supp. 1075, 1101 (1988) (holding that the Commission may not weigh causes, and an affirmative injury determination is warranted if imports contribute even minimally); *Hercules Inc. v. United States*, 11 CIT 710, 742–43, 673 F. Supp. 454, 481–82 (1987) ("If the ITC finds material injury exists due to an even slight contribution from imports, the ITC may not weigh this contribution against the effects of other factors that are not used in the determination.").

[31] *See* Plaintiff's Reply Brief at 8–9, reiterated at oral argument.

injured by the LTFV imports, the Commission's determination is in accord with the remedial purpose of the statute.[32]

2. *Is the Commission's determination that Dow closed one of its plants because of the subject imports supported by substantial evidence, and otherwise in accordance with law?*

The Commission found that the domestic producers' market share declined from 1992 to 1993 while the volume and market share of the LTFV imports increased.[33] Domestic producers lowered their prices in order to maintain production volumes.[34] However, one producer, Dow, reconsidered its plan to restructure one of its plants, and instead decided to shut it down.[35]

Plaintiff claims that the Commission's determination should be reversed[36] or, alternatively, remanded[37] for further fact finding on the reasons for the Dow plant closure. Plaintiff contends that the Commission's conclusion that the LTFV imports were responsible for Dow's closure of the plant is not supported by substantial evidence on the record. Such conclusion, plaintiff argues, is only supported by statements offered by a witness at the hearing[38] and by petitioners in their post-hearing brief,[39] to which Chairman Watson gave "little credence."[40]

Plaintiff claims that Dow's decision, instead, was based on long-term market considerations. Press releases issued by Dow at the time of the plant closing did not mention the subject imports as the cause of the closing. Moreover, plaintiff alleges that Dow never complied with the Commission's request to provide evidence[41] supporting the claim that Dow's decision to close plant B was caused by the impact of the subject imports.[42] Dow's failure to provide the requested additional evidence is, according to plaintiff, a sufficient basis for drawing an adverse inference against Dow.[43] In addition, the Commission could have reached a differ-

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[32] *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990); *Chr. Bjelland Seafoods A/S (Now Norwegian Salmon A/S) v. United States*, slip op. 95–5 at 21 (Jan. 8, 1995) (*"Norwegian Salmon II"*).

[33] *Determination* at 22 (List 1, Doc. 106).

[34] *Id.* The Commisson found that producers must keep the electrolytic cells used in the production of magnesium in constant operation. If the cells are not kept running constantly, they deteriorate and must be rebuilt, which is very expensive. *Id.* at 10–11.

[35] *Id.* at 22.

[36] Plaintiff cites *American Spring Wire Corp. v. United States*, 8 CIT 20, 590 F. Supp. 1273 (1984); *Norwegian Salmon II*.

[37] Plaintiff cites *USX Corp. v. United States*, 12 CIT 205, 682 F. Supp. 60 (1988).

[38] *Transcript of Proceedings* at 31–33 (List 1, Doc. 73).

[39] Petitioners' Posthearing Brief, Appendix B at 28–29 (List 2, Doc. 29).

[40] *Determination* at 30 (Views of Chairman Watson, dissenting) (List 1, Doc. 106). Plaintiff relies on *USX Corp. v. United States*, 11 CIT 82, 84, 655 F. Supp. 487, 489 (1987) ("ITC may not rely upon isolated tidbits of data which suggest a result contrary to the clear weight of the evidence.") and on *Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 1034, 728 F. Supp. 730, 746 (1989) ("The testimony of a witness is not dispositive," adding, however, that "[t]he Commission has authority to weigh all evidence relevant to intent and to reject the testimony of representatives of interested parties when warranted.") (citing *American Permac, Inc. v. United States*, 10 CIT 719, 724, 656 F. Supp. 1228, 1233 (1986), *aff'd*, 831 F.2d 269 (Fed. Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988)).

[41] *Transcript of Proceedings* at 220 (List 1, Doc. 73) (reported at 236 in plaintiff's copy, Doc. 5, Public Appendix to Plaintiff's Brief).

[42] *Id.* at 31–32 (List 1, Doc. 73).

[43] Plaintiff relies on *Alberta Pork Producers' Marketing Board v. United States*, 11 CIT 563, 580, 669 F. Supp. 445, 459 (1987) (citations omitted). This case, however, discussed ITC's discretion to draw an adverse inference with respect to injury based upon a party's *failure to participate in the administrative proceedings*. *See Chung Ling Co., Ltd. v. United States*, 16 CIT 636, 638–39, 805 F. Supp. 45, 48 (1992).

ent determination based on the best information available ("BIA").[44] Plaintiff concludes that the Commission thus erred in finding that the plant shutdown supported a material injury determination.[45] The Court finds these arguments unpersuasive.

Factual findings based on the analysis of the volume and impact of the subject imports support the Commission's conclusion regarding Dow's shutdown. The Commission found that "[o]ne producer, Dow Chemical, reacted to the loss in market share to the LTFV imports, *among other factors*, by shutting down one of its plants * * *."[46] Thus, the Commission's finding does not rest only on the testimony of Dow's manager.[47] Even the authorities cited by the plaintiff[48] recognize that the Commission has discretion to accept or reject testimony. Although different conclusions could be drawn about the causation of Dow's shutdown, the possibility of reaching two inconsistent conclusions from the same evidence does not prevent the Commission's finding from being supported by substantial evidence. *Consolo*, 383 U.S. at 620; *Grupo Indus. Camesa*, No. 94–1436 at 12 (Fed. Cir. June 10, 1996); *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 814 (1992); *Matsushita*, 750 F.2d at 933. Moreover, in its posthearing brief, Dow furnished an explanation of the reasons for the shutdown.[49] Dow also produced an internal memorandum reporting the reason for canceling the plant B project.[50] Accordingly, an adverse inference cannot be taken against Dow, because Dow did provide supporting evidence, and because the rule applies "only 'when a party has relevant evidence in his control which he fails to produce.'" *Atlantic Sugar, Ltd. v. United States*, 4 CIT 248, 251, 553 F. Supp. 1055, 1059 (1982) (citing *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329, 1336 (D.C. Cir. 1972)).[51]

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[44] *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1560–61 (Fed. Cir. 1984). "[T]he absence of information necessary for a thorough analysis may render a determination unsupported by substantial evidence." *USX Corp. v. United States*, 11 CIT 82, 95, 655 F. Supp. 487, 498 (1987) (reaffirming that the ITC must collect all accessible information necessary for its analysis of the economic factors).

[45] *Determination* at 22 (List 1, Doc. 106). Plaintiff claims that Dow could not distinguish between fairly-traded Russian imports and LTFV imports at the time it decided to close the plant, and its account of the reasons that led to that decision is therefore flawed. (Plaintiff's Reply Brief at 11.)

[46] *Determination* at 22 (List 1, Doc. 106) (emphasis provided). Import volume and pricing data corroborate Dow's assertions that the subject imports were gaining market share. Moreover, as defendant-intervenors correctly point out, other factors may well have influenced Dow's decision. Nevertheless, the prerequisite of causation is satisfied if the "imports contribute, even minimally, to the conditions of the domestic industry, and the Commission is precluded from weighing causes." *Grupo Indus. Camesa v. United States*, 18 CIT ___, 853 F. Supp. 440, 444 (1994) (citing *British Steel Corp. v. United States*, 8 CIT 86, 96, 593 F. Supp. 405, 413 (1984)), *aff'd*, 85 F.3d 1577 (Fed. Cir. 1996).

[47] In any case, it is for the ITC to assess the credibility of witnesses. *Negev Phosphates, Ltd. v. United States Department of Commerce*, 12 CIT 1074, 1092, 699 F. Supp. 938, 953 (1988). *See also Chung Ling Co. v. United States*, 16 CIT 636, 648, 805 F. Supp. 45, 55 (1992) (holding that it is for the Commission to decide factual issues).

As consistently held by the Court of Appeals for the Federal Circuit, even if the administrative record contains evidence which detracts from the evidence relied upon by the Commission, it is not for the court to decide whether it would have reached the same decision reached by the Commission. The role of the court is limited to a narrow standard of review. *Matsushita*, 750 F.2d at 936. *See also Consolo*, 383 U.S. at 620; *Grupo Indus. Camesa*, 85 F.3d at 1582.

[48] *Metallverken Nederland*, 13 CIT 1013, 728 F. Supp. 730 (1989); *American Permac*, 10 CIT 719, 656 F. Supp. 1228 (1986), *aff'd*, 831 F.2d 269 (Fed. Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

[49] Dow's Post-Hearing Brief at 31–32 (response to Question 7), List 2, Doc. 29. Defendant-intervenors note that the evidence supports the conclusion that it was the anticipated *long-term presence* of imports that forced Dow to shut down plant B. *Transcript of Proceedings* at 31–32 (List 1, Doc. 73, App. 5). It would not have been rational to shut down the plant in the presence of a short-term occurrence, because restarting a closed production plant is very expensive, and cells must be kept in constant operation. *Determination* at 10–11 (List 1, Doc. 106, App. 2).

[50] Dow's Post-Hearing Brief (List 2, Doc. 29, Exhibit 3).

[51] *Chung Ling*, 16 CIT 636, 805 F. Supp. 45, the case cited by plaintiff, dealt with domestic producers' noncooperation in responding to Commission questionnaires.

"The question is not whether the Commission might have obtained additional information, but whether its determinations are supported by substantial evidence and are in accordance with law." *Stalexport and Huta Czestochowa v. United States*, 19 CIT ____, 890 F. Supp. 1053, 1076 (1995) (citations omitted). Other factors were accounted for in the Commission's determination.[52] The Commission determined that subject imports had depressed prices, or prevented price increases, and had caused lost sales/revenues.[53] The resultant significant adverse impact on the domestic industry caused Dow to react by closing its plant B.[54]

The Court concludes that the record, viewed as a whole, contains substantial evidence supporting the Commission's determination that Dow's decision to close its plant B was caused by the subject imports, among other factors, and that Dow's closing was only one of the many indicia of adverse impact on the domestic industry.

3. *Is the Commission's determination of present material injury supported by substantial evidence, and otherwise in accordance with law?*

The Commission made a positive injury determination regarding the Ukrainian imports of pure magnesium at issue. Plaintiff avers that there is no *present* injury because the subject imports decreased after June 1994, while the Commission did not reach its determination until April 1995.

In an antidumping investigation, the Commission determines whether an industry in the United States is materially injured, or is threatened with material injury, by reason of imports which Commerce has determined to be sold at LTFV. 19 U.S.C. § 1673d(b)(1) (1988). The statute defines material injury as a "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1988). Among the relevant economic factors for the Commission to consider are the volume of the subject imports, their effect on prices of that merchandise or like products, and their impact on domestic producers of like products. 19 U.S.C. § 1677(7)(B).

The volume and the value of LTFV imports increased from 1992 through the first half of 1994.[55] Then, the LTFV imports virtually stopped.[56] Plaintiff contends that there could not be *present* injury because of such decrease in imports. The Commission, however, attributed the virtual cessation of LTFV imports after June 1994 to its preliminary affirmative determination in May 1994.[57]

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[52] *Determination* at 22, *Conf. Determination* at 36 (List 1, Doc. 106; List 2, Doc. 42).

[53] *Determination* at 20–21 (List 1, Doc. 106).

[54] *Determination* at 22 (List 1, Doc. 106).

[55] *Determination* at 19, and references to tables ibidem (List 1, Doc. 106); Memorandum INV-S–056 (April 26, 1995) (List 1, Doc. 102).

[56] *Determination* at Table 24, I–24 (List 1, Doc. 106), *Conf. Determination* at I–46 (List 2, Doc. 42); Memorandum INV-S–056 (List 1, Doc. 102) (attaching additional information as requested by Commissioner Bragg: 1994 monthly imports, by country, in metric tons, for pure magnesium; the imports from Ukraine stopped in May, the imports from China and Russia stopped in June; Chinese imports were reported again, in regular quantities, in September and October).

[57] *Determination* at 19 n. 119 (citing *Metallverken Nederland*, 744 F. Supp. at 284 (CIT 1990)) (List 1, Doc. 106).

Plaintiff avers that the decision to close the period of investigation on June 1994 was error. Plaintiff argues that the substantial decrease in imports during 1994 was caused by the liquidation of the Soviet military stockpile of magnesium, by Ukrainian power shortages, by a decision of the Ukrainian government to allocate more magnesium production for domestic consumption, and by more attractive selling terms in other parts of the world. Another cause was the loss of duty-free treatment effective July 1, 1994,[58] which resulted in the imposition of the regular duty rate of 8.00 percent *ad valorem*.

Plaintiff indicates that even though fairly-traded imports were not subject to antidumping duties they also declined during 1994, and their volume followed a pattern similar to that of LTFV imports. Plaintiff asserts that all these economic data should rebut the presumption that the decrease in LTFV imports was caused by the imposition of antidumping duties.[59] Finally, plaintiff claims that no record evidence supports the presumption that imports stopped due to the investigations, nor has the Commission provided an explanation for its presumption.[60] Consequently, plaintiff contends that the required determination of *present* material injury was erroneous.

Maintaining that the material injury must exist "at the time of the Commission's final determination," *Norwegian Salmon I*, 16 CIT at 954,[61] plaintiff argues that the determination is wrong because it looked at allegations of lost sales or lost revenues which mostly occurred in 1993, a long time before the Commission reached its decision at the meeting held on April 26, 1995. The major volume increases and price declines occurred when the subject imports consisted mostly of magnesium from the Soviet stockpile. This evidence, according to plaintiff, points to past and not present injury.[62] In addition, plaintiff argues that the supply shortages which occurred as soon as subject imports stopped indicate that the domestic industry was unable to meet domestic

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[58] *Notice that Certain Imports from Russia Have Exceeded the GSP Competitive Need Limits*, 59 Fed. Reg. 15,247 (U.S. Trade Rep. 1994).

[59] *Chr. Bjelland Seafoods A/C v. United States*, 16 CIT 945 (1992) ("Norwegian Salmon I").

[60] *Norwegian Salmon I*, 16 CIT at 952 (1992) ("The Commission fails to explain, as it must, its conclusion that the decrease in the volume of imports * * * cannot be the result of * * *.") (citing *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974) and *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Bowman Transportation, one of the cases relied upon in *Norwegian Salmon I*, applied the "arbitrary and capricious" standard. The Supreme Court indicated that "[t]he agency must articulate a 'rational connection between the facts found and the choice made.'" *Bowman Transportation*, 419 U.S. at 285 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). The Court concluded, however, that "we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 286 (citing *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945)).

[61] *See also Chr. Bjelland Seafoods A/S (Now Norwegian Salmon A/S) v. United States*, slip op. 95–5 at 21 (Court Int'l Trade Jan. 8, 1995). The court declared that the information collected within the time frame established by the ITC for its investigation represents a reference for an analysis of the condition of the domestic industry. The present material injury determination is "as recent to vote day as possible, given the limitations of the collected data." *Id.*

[62] Plaintiff cites *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990). *Chaparral Steel* underscored that the remedial, rather than punitive, compensatory, or retaliatory nature of antidumping duties, indicates that subject imports can only be considered for their *present* injury to the domestic industry. *Id.* at 1103 (citing S. Rep. No. 249, 96th Cong., 1st Sess. 87, *reprinted in* 1979 U.S.C.C.A.N. 381, 473). A different reading would be inconsistent with the General Agreement on Tariffs and Trade. *Id.*, n. 5. The court added that "[e]ven when the Commission makes a determination of 'threat of material injury' it assesses the 'threat of the specific indicia of *present* material injury.'" *Id.* at 1104 (citing *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 52, 592 F. Supp. 1318, 1322 (1984) (emphasis in original).

demand.[63] Evidence of such supply shortages limits the probability of material injury by reason of LTFV imports.

This court has held that the Commission has discretion to choose "the most appropriate period of time for its investigation." *Saarstahl AG v. United States*, 18 CIT ___, 858 F. Supp. 196, 200 (1994) (interpreting *Norwegian Salmon I*, and citing *Kenda Rubber Indus. Co. v. United States*, 10 CIT 120, 126–27, 630 F. Supp. 354, 359 (1986)).[64] The magnesium imports at issue here ceased immediately after the Commission's preliminary determination in May 1994.[65] These circumstances induced the Commission not to rely on import data following its preliminary determination.[66] This treatment is consistent with the Commission's past practice, and with this court's decisions.[67]

The Court recognizes that the Commission also considered most of the arguments which pointed to causes other than the initiation of antidumping investigations. The Commission found that prices in Europe were not higher than prices in the United States.[68] The Commission also found that magnesium from the Soviet stockpile was imported "over most of the period of investigation and hardly constitute[d] a one-time or short-lived occurrence."[69] The investigation showed no relation between the depletion of the Soviet stockpile and the decline in imports. In any case, during the time when stockpile magnesium was imported, newly-produced Ukrainian and Russian pure magnesium was also being imported.[70]

The Court also finds unpersuasive plaintiff's argument that the change in tariff treatment caused the decline in imports. Russian imports began in the third quarter of 1992.[71] Russia did not receive Generalized System of Preferences ("GSP") status until September 30,

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[63] Gerald Metals acknowledges that Dow's shutdown and the consequent decrease in domestic capacity caused the supply shortages that occurred in 1994 and early 1995. (Plaintiff's Memorandum at 25.)

[64] *Saarstahl* explained *Norwegian Salmon I* as advocating the use of information as contemporaneous as possible, without overlooking, however, the existence of latent effects of a present injury. *Id.* at 200.

[65] This pattern supports the presumption that the imports ceased because of the preliminary determination, and immediately prior to the first date on which retroactive duties could have been assessed. (Magnesium's Brief at 19.) *See* 19 U.S.C. § 1673b(a) (1988).

[66] *Determination* at 19, n. 119 (List 1, Doc. 106); *Conf. Determination* at 30, n. 155 (List 2, Doc. 42).

[67] *Kern-Liebers USA, Inc. v. United States*, 19 CIT ___, slip op. 95–9 at 35 (Jan. 27, 1995), *appeals docketed sub nom. U.S. Steel v. United States*, Nos. 95–1257, –1306, –1307 (Fed. Cir. Mar. 28, 1995) (holding that the Commission may not rely on data collected after the initiation of the investigations); *Saarstahl*, 858 F. Supp. at 200 (explaining that Commission reasonably found that improvements in the condition of the domestic industry resulted from preliminary investigations); *Metallverken Nederland B.V. v. United States*, 14 CIT 481, 484, 744 F. Supp. 281, 284 (1990) (holding that data may be distorted by the initiation of investigation, which can create an artificially low demand for the affected imports). *See also U.S. Steel Group v. United States*, 18 CIT ___, 873 F. Supp. 673, 700 (1994), *appeal docketed*, No. 95–1245 (Fed. Cir. Feb. 24, 1995) ("The court has not in the past required that the Commission rely upon interim data, due to concerns as to reliability.").

[68] *Determination* at 19, n. 119 (List 1, Doc. 106); *Conf. Determination* at 30, n. 115 (List 2, Doc. 42) (citing Memorandum INV-S–055, List 1, Doc. 95;List 2, Doc. 36).

[69] *Determination* at 20 (List 1, Doc. 106), *Conf. Determination* at 32 (List 2, Doc. 42). Plaintiff's testimony at the hearing indicated that the stockpiles were depleted at the end of 1993. *Transcript of Proceedings* at 192 (List 1, Doc. 73). Defendant-intervenors contend that, if there was any relation between the depletion of the Soviet stockpile and the subject imports, the halt in imports should have occurred in late 1993. (Magnesium's Brief at 20.)

[70] *Determination* at 15–16 (List 1, Doc. 106), *Conf. Determination* at 24 (List 2, Doc. 42). *Transcript of Proceedings* at 192–93 (List 1, Doc. 73).

[71] *Transcript of Proceedings* at 43 (testimony of Dr. Kenneth R. Button). Indeed, the Russian Federation received most favored nation ("MFN") treatment effective June 17, 1992 (57 Fed. Reg. 27,840) (June 22, 1992). Ukraine received MFN treatment effective June 23, 1992 (57 Fed. Reg. 28,771) (June 26, 1992).

1993.[72] Consequently, GSP benefits had no effect on the volume of imports. Moreover, Ukraine did not benefit from GSP status. Thus, Russia's loss of GSP status cannot explain the cessation of imports from Ukraine at the same time.

Plaintiff's last argument that fairly-traded Russian imports stopped at the same time LTFV imports stopped is also unpersuasive. At the time Commerce initiated its investigations in March 1994, it did not distinguish fairly-traded imports from LTFV imports.[73] Such distinction was reached in March 1995 with Commerce's final determination. Therefore, when the imports stopped in June 1994, all imports were potentially subject to suspension of liquidation because potentially subject to a final affirmative determination.

The defendant Commission admits that its decision did not address every possible argument, e.g., the Ukrainian power shortage, or the change in Ukrainian government policies.[74] The Commission, however, is presumed to have considered all evidence, *Granges Metallverken,* 13 CIT at 479, 716 F. Supp. at 24, and does not have to respond to each piece of evidence presented by the parties, *id.* at 478–79, 716 F. Supp. at 24 (citing *Nat'l Ass'n of Mirror Mfrs. v. United States,* 12 CIT 771, 780, 696 F. Supp. 642, 648–49 (1987)); *Empire Plow Co. v. United States,* 11 CIT 847, 854, 675 F. Supp. 1348, 1354 (1987); *British Steel Corp. v. United States,* 8 CIT 86, 98, 593 F. Supp. 405, 415 (1984)). *See also Mitsubishi Materials Corp. v. United States,* 17 CIT 301, 312, 820 F. Supp. 608, 619 (1993) ("[T]he Commission is not required to discuss all information upon which it relied in making its determination * * *."); *Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1083, 699 F. Supp. 938 (1988).

Finally, as defendant notes, the statute does not require that injury be caused by imports entered at the time of the Commission's determination.[75] Plaintiff's argument about the exclusion of any present injury because of the 1994 domestic supply shortages is flawed, because it confuses the cause with the effect. Such shortages were caused by a decrease in domestic capacity which, in turn, was caused by the subject imports. Tight supply conditions were the results of the injury to the domestic industry, including loss of productive capacity.[76] Moreover, the effects of LTFV imports may be latent. *Saarstahl,* 858 F. Supp. at 200;

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[72] *Proclamation No. 6599: To Amend The Generalized System of Preferences,* 58 Fed. Reg. 51,561 (October 1, 1993) (attached as Exhibit 7 to Petitioners' Posthearing Brief, in List 2, Doc. 29).

[73] In initiating its investigations, Commerce announced proposed dumping margins of 40.15% and higher for pure magnesium from the subject countries. *Initiation of Antidumping Duty Investigations: Pure and Alloy Magnesium from the People's Republic of China, the Russia Federation, and Ukraine,* 59 Fed. Reg. 21,748–50 (April 26, 1994).

[74] Defendant-intervenors contend that the power problem at a production plant in Ukraine, which plaintiff's testimony reported as occurring in late February until the beginning of April, does not explain the halt in Russian imports. (Magnesium's Brief at 21.)

[75] Defendant notes that in the case cited by plaintiff, *Chaparral Steel Co. v. United States,* 901 F.2d 1097, 1104 (Fed. Cir. 1990), the court recognized that subject imports could have a "continuing impact as of vote day." *Id.*

[76] Defendant-intervenors submit that the volume of domestic production relative to domestic demand is not the sole measure of injury. The Commission is not required to consider the industry's ability to meet domestic demand. 19 U.S.C. § 1677(7). Rather, it must consider the volume of subject imports and any increase relative to domestic production or consumption. 19 U.S.C. § 1677(7)(B), (C)(i). Then, it must consider if underselling exists, and whether imports otherwise suppress and depress prices. 19 U.S.C. § 1677(7)(C)(ii). The Commission must also consider all other relevant economic factors. 19 U.S.C. § 1677(7)(C)(iii).

Kern-Liebers, slip op. 95–9 at 34–35; *Norwegian Salmon II*, slip op. 95–5 at 32.

The Commission considered the impact of the subject imports on the domestic industry.[77] The legislative history recognizes that adverse effects may become manifest over a long term.[78] The Commission found that this is especially true in the case of the magnesium industry, where injury may be experienced over a long term because of the nature of magnesium operations and the high cost of rehabilitating electrolytic cells once they have been shut down.[79] Consequently, the Commission's affirmative determination of present material injury is supported by substantial evidence on the administrative record, and otherwise in accordance with law.

CONCLUSION

The Commission's affirmative determination of material injury is supported by substantial evidence on the administrative record, and otherwise in accordance with law. Accordingly, plaintiff's motion for judgment upon the agency record is denied and this action is dismissed.

(Slip Op. 96–143)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–03–00156

(Dated August 23, 1996)

JUDGMENT

TSOUCALAS, *Judge:* On June 12, 1996, this Court, in *Koyo Seiko Co. v. United States*, 20 CIT ___, Slip Op. 96–94 (1996), remanded the final results entitled *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Final Results of Antidumping Duty Administrative Review ("Final Results")*, 57 Fed. Reg. 4,960 (Feb. 11, 1992), to the Department of Commerce, International Trade Administration ("Commerce"). In accordance with the March 20, 1996, decision and mandate of the United States Court of Appeals for the Federal Circuit, Appeal Nos. 95–1294, 95–1303, the Court ordered Commerce to recalculate the dumping margins for tapered roller bearings ("TRBs")

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[77] 19 U.S.C. § 1677(7)(C)(iii)(III), (IV) (1988). Factors to consider include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development. All factors are to be considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.*

[78] S. Rep. No. 71, 100th Cong., 1st Sess. 117 (1987).

[79] *Determination* at 10–11, 22 (List 1, Doc. 106).

produced by Koyo Seiko Co., Ltd., and distributed by its subsidiary, Koyo Corporation of U.S.A. (collectively "Koyo") without imposing the ten percent cap to each of the five criteria used to match U.S. TRBs with home market TRBs.

Commerce complied with the Court's directive in *Koyo Seiko* by removing the ten percent cap from the sum-of-the-deviations model-match computer programming language and recalculated Koyo's 1989–90 antidumping duty margin. *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States, Slip Op. 96–94 (June 12, 1996), Final Results of Redetermination Pursuant to Court Remand ("Redetermination on Remand")* (filed August 12, 1996). The dumping margin for Koyo for the period October 1, 1989—September 30, 1990, without imposition of the ten percent cap, is 30.08%. *Id.*

Accordingly, the Court affirms Commerce's Redetermination on Remand in its entirety. This case is dismissed.

(Slip Op. 96–144)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–03–00169

(Dated August 23, 1996)

JUDGMENT

TSOUCALAS, *Judge:* On June 12, 1996, this Court, in *Koyo Seiko Co. v. United States,* 20 CIT ____, Slip Op. 96–91 (1996), remanded the final results entitled *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review ("Final Results"),* 57 Fed. Reg. 4,951 (Feb. 11, 1992), to the Department of Commerce, International Trade Administration ("Commerce"). In accordance with the March 19, 1996, decision and March 20, 1996, mandate of the United States Court of Appeals for the Federal Circuit, Appeal Nos. 95–1300, 95–1341, the Court ordered Commerce to recalculate the dumping margins for tapered roller bearings ("TRBs") produced by Koyo Seiko Co., Ltd., and distributed by its subsidiary, Koyo Corporation of U.S.A. (collectively "Koyo") without imposing the ten percent cap to each of the five criteria used to match U.S. TRBs with home market TRBs.

Commerce complied with the Court's directive in *Koyo Seiko* by removing the ten percent cap from the sum-of-the-deviations model-match methodology and recalculated Koyo's 1988–89 antidumping duty margin. *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United*

States, Slip Op. 96–91 (June 12, 1996), Final Results of Redetermination Pursuant to Court Remand ("Redetermination on Remand"). The dumping margin for Koyo for the period October 1, 1988—September 30, 1989, without imposition of the ten percent cap, is 24.88%. *Id.*

Accordingly, the Court affirms Commerce's Redetermination on Remand in its entirety. This case is dismissed.

(Slip Op. 96–145)

SOCIETE NOUVELLE DE ROULEMENTS (SNR), PLAINTIFF *v.* UNITED STATES, DEFENDANT, TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92–07–00520

(Dated August 23, 1996)

JUDGMENT

TSOUCALAS, *Judge:* On June 3, 1996, this Court, in *Societe Nouvelle de Roulements (SNR) v. United States,* 20 CIT ____, 927 F. Supp. 1558 (1996), remanded the final results entitled *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")* 57 Fed. Reg. 28,360 (1992), and amended by *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 57 Fed Reg. 59,080 (1992). The Court ordered the Department of Commerce, International Trade Administration ("Commerce"), to reconsider its refusal to correct two errors allegedly contained in plaintiff's model identification codes and in the computer tape field identifying the bearing family, in light of *NTN Bearing Corp. v. United States,* 73 F.3d 1202 (Fed. Cir. 1995).

In accordance with the Court's instructions in *SNR,* Commerce reconsidered its decision in the Final Results to not correct errors allegedly made by plaintiff in its reported home market model codes and families for certain bearing models. In the *Societe Nouvelle de Roulements v. United States, Slip Op. 96–87 (June 3, 1996), Final Results of Redetermination Pursuant to Court Remand ("Redetermination on Remand"),* filed August 2, 1996, Commerce concluded that correction of the clerical errors is appropriate in this case. Accordingly, it corrected plaintiff's product identification numbers and modified the computer program to ensure that identical matches are selected where they exist. Plaintiff's recalculated weighted-average percentage dumping margins for May 1, 1990—April 30, 1991, is 8.08% for ball bearings and 18.37% for cylindrical roller bearings. *Redetermination on Remand.*

Therefore, the Court sustains Commerce's Redetermination on Remand in its entirety. This case is dismissed.

(Slip. Op. 96–146)

UNITED STATES OF AMERICA, PLAINTIFF *v.* COMPLEX MACHINE WORKS CO., ANDRAS NYAKAS, ANDRAS NYAKAS D/B/A COMPLEX MACHINE WORKS CO., AND ANDRAS H. NYAKAS, DEFENDANTS

Court No. 95–10–01319

(Decided August 23, 1996)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, and *Rhonda K. Schnare,* Commercial Litigation Branch, Civil Division, U.S.Dept. of Justice, for Plaintiff.

Linda N. Mansour, for Defendant.

ORDER DENYING MOTION TO DISMISS

I

INTRODUCTION

WALLACH, *Judge:* This is an action by the United States for fraud, negligence and gross negligence. The Government seeks civil penalties and to collect customs duties pursuant to 19 U.S.C. § 1592 (1988). The case arises from a series of entries into the United States from Canada between June 24, 1986 and April 20, 1991.[1] Plaintiff's Complaint[2], which was filed on October 17, 1995, bases its claims on certain alleged false acts, statements, documents and omissions, and states that it had no notice of them until October 18, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1582 (1988).

Defendants have moved to dismiss asserting two theories. They claim first that the Government's Complaint is barred by the five year statute of limitations found in 19 U.S.C. § 1621. They also assert that since they have already pleaded guilty to criminal charges arising out of the same series of imports, the Government's attempt to obtain civil penalties violates the Fifth Amendment's prohibition of double jeopardy.

For the reasons set forth below, Defendant's Motion is denied.

II

DISCUSSION

A

THE GOVERNMENT'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

19 U.S.C. § 1621 provides in part:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless

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[1] The Government seeks damages for fraud for the entire period under a tolling theory. It seeks damages for gross negligence and negligence only for those entries which occurred in the five years preceding the filing of the Complaint.

[2] Since this is a Motion To Dismiss by Defendant, the Court takes as true for purposes of this Motion only, the factual allegations of Plaintiff's Complaint. USCIT R. 12(b). *Fabrene, Inc. v. United States,* 17 CIT 911 (1993).

> such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided,* That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed * * *

Defendants make two arguments under the statute. They claim that 1) "* * * since the [C]omplaint alleges several **continuous** transactions that occurred from June 24, 1986", then all claims are time barred, and 2) that even if the continuous transaction doctrine is inapplicable, the limitations period for all claims, including fraud, must run from the date an alleged violation occurred rather than its alleged date of discovery. Both arguments are without merit.

1

THE CONTINUING VIOLATION DOCTRINE IS INAPPLICABLE IN THIS CASE

Defendants' reliance on the continuing violation doctrine represents a fundamental misunderstanding of the concept. They argue that where a series of violations is continuous, the statute commences running from the date of the first violation.

To the contrary, as the Seventh Circuit noted in *Selan v. Kiley,* 969 F.2d 560 (7th Cir. 1991):

> The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period.

Id. at 564.

Accordingly, as the Government argues in reliance on *Van Heest v. McNeilab, Inc.,* 624 F. Supp. 891 (D. Del. 1985):

> * * * if defendant engages in a continuing course of prohibited conduct and plaintiff's action is timely as to any act of that course of conduct, plaintiff will be allowed to litigate statutory violations within the limitations period and all preceding violations that are a part of that course of conduct.

Id. at 896.

Thus, contrary to Defendants' argument, if the continuing violation doctrine were applicable here, the Government could properly seek damages for *all* violations if *any* fell within the time allowed by the statute. Defendants' other argument under the statute is equally jejune.

2

THE STATUTE OF LIMITATIONS FOR FRAUD BEGINS TO RUN AT THE TIME OF DISCOVERY

Despite the clear language of 19 U.S.C. § 1621 Defendants argue that in an action for damages for fraud and some other claim such as negligence, the fraud statute is subsumed by the additional claim, and begins

to run at the time violation is committed. The argument is based solely on a misreading of this Court's decision in *United States v. Obron Atlantic Corp.*, 862 F. Supp. 378 (CIT 1994).

Defendants concede that *Obron* holds, consistent with § 1621, that the statute of limitations is properly measured from the date the Government became aware of the alleged fraud. Motion to Dismiss at p.4. They then state that:

> However, the Court in *Obron* further held that "[b]ecause Customs **only alleged fraud*** * *, the statute of limitations is properly measured from * * * when Customs become [sic] aware of the alleged fraudulent violations." *Id.* at 382.
>
> Thus, the distinction between *Obron* and the case at bar is that the Plaintiffs in *Obron* only made allegations as to fraud and not gross negligence or negligence as alleged in the case at bar. Therefore, the proper calculation for statute of limitations purposes is the date that the alleged fraudulent, negligent, or grossly negligent conduct occurred.

Motion To Dismiss at p.4.

Defendants cite no other authority for the proposition.

In response, the Government has accurately pointed out that Defendant's discussion of *Obron* "* * *is incomplete and taken out of context." Plaintiff's Opposition at p. 6.

Obron, dealt, as the entire quotation makes clear[3], with the question of whether Customs gave sufficient response time in an administrative proceeding under 19 C.F.R. § 162.78 (1992) which allows the Government to require a response in less than thirty days if less than one year remains before a statute of limitations may be asserted as a defense. *Obron,* at most, implies only that if the penalty notice includes a negligence claim the limitations period should be measured from the earlier of the *two* relevant dates for determining the length of the administrative response period. It has nothing to do with the availability of separate Statute of Limitations provisions for alternative claims in an action for damages and civil penalties.

The language of § 1621 is clear[4]. There are two separate statutory periods for fraud and negligence claims. The Government in this case seeks only to recover on acts which fall within the proper time periods for each such type of claim. Accordingly, Defendants' Motion under the Statute of Limitations is denied.

B

The Double Jeopardy Clause Does Not Apply To Civil Penalties Under Section 1592

Defendants' other argument is that because they have been previously convicted of criminal violations arising from the entries here at

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[3] Defendants omitted the words "in the prepenalty and penalty notices" from the above cited quotation from *Obron.*

[4] Defendants also cite to *United States v. R.I.T.A. Organics, Inc.*, 487 F. Supp. 75 (N.D.Ill. 1980). *R.I.T.A.* holds only that where Customs should have known of the existence of a fraud, it may not assert the discovery exception for a date past the time when it should have been discovered. It is here inapposite.

issue, the Fifth Amendment's prohibition of double jeopardy bars the imposition of civil penalties under 19 U.S.C. § 1592. That argument has been repeatedly and squarely rejected by this Court. *See United States v. Ziegler Bolt And Parts Co.*, 20 CIT ____, Slip Op 95–3 (Jan 13, 1995), and the cases cited therein. This Court adopts the reasoning set forth in those cases and accordingly rejects Defendants' argument.

III

CONCLUSION

For the reasons set forth above Defendants' Motion to Dismiss is denied.

PUBLIC VERSION

(Slip Op. 96–147)

GENEVA STEEL, AK STEEL CORP., BETHLEHEM STEEL CORP., GULF STATES STEEL INC. OF ALABAMA, INLAND STEEL INDUSTRIES, INC., LTV STEEL CO., INC., LACLEDE STEEL CO., NATIONAL STEEL CORP., SHARON STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., AND WCI STEEL, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, FABRIQUE DE FER DE CHARLEROI, S.A., S.A. FORGES DE CLABECQ, SIDMAR N.V., AND TRADEARBED, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 93–09–00566–CVD
(Belgium Country-Specific)

Domestic Producers challenge that aspect of Commerce's *Redetermination on Remand, Final Countervailng* [sic] *Duty Determinations, Certain Steel Products From Belgium* (dated May 10, 1996), concerning the redemption of Sidmar N.V.'s preferred shares.

Held: Commerce's remand determination is sustained in its entirety as based on substantial evidence and as otherwise in accordance with law.

(Dated August 27, 1996)

Dewey Ballantine (Alan W. Wolff, Michael H. Stein, Martha J. Talley, John A. Ragosta, Michael R. Geroe), Counsel for Geneva Steel, *et al.; Barnes, Richardson & Colburn (Gunter von Conrad, Peter A. Martin),* Counsel for Fabrique de Fer de Charleroi, S.A.; *LeBoeuf, Lamb, Greene & MacRae (Melvin S. Schwechter, Barbara R. Newell),* Counsel for S.A. *Forges de Clabecq; O'Melveny & Myers (Gary N. Horlick, Peggy A. Clarke, Teresa E. Dawson),* Counsel for Sidmar N.V. and TradeARBED, Incorporated.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (Velta A. Melnbrencis), Duane W. Layton, Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Geneva Steel, AK Steel Corporation,[1] Bethlehem Steel Corporation, Gulf States Steel Incorporated of Alabama, Inland

[1] At the time the complaint was filed, AK Steel Corporation was named Armco Steel Company, L.P.

Steel Industries, Incorporated, LTV Steel Company, Incorporated, Laclede Steel Company, National Steel Corporation, Sharon Steel Corporation, U.S. Steel Group a Unit of USX Corporation, and WCI Steel, Incorporated (collectively "Domestic Producers"), challenge that aspect of the Department of Commerce's ("Department" or "Commerce") *Redetermination on Remand, Final Countervailng* [sic] *Duty Determinations, Certain Steel Products From Belgium* (dated May 10, 1996) *(Redetermination)* concerning Sidmar N.V.'s (Sidmar) preferred shares. The Court has retained jurisdiction during the pendency of this action. 28 U.S.C. § 1581(c) (1988).

BACKGROUND

On July 9, 1993, Commerce published the final results of its countervailing duty investigation of several Belgian steel companies. *Certain Steel Products From Belgium,* 58 Fed. Reg. 37,273 (Dep't Comm. 1993) (final determ.), *amended by Certain Steel Products From Belgium,* 58 Fed. Reg. 43,749 (Dep't Comm. 1993) (order and amend. to final determ.) *(Final Determination).* The Belgian steel firms investigated were Fabrique de Fer de Charleroi, S.A. (Fabfer), S.A. Cockerill Sambre (Cockerill), S.A. Forges de Clabecq (Clabecq), and Sidmar.

Plaintiffs in the consolidated action, Domestic Producers and Fabfer, each filed motions for judgment upon the agency record pursuant to U.S. CIT R. 56.2 contesting the *Final Determination.* Defendant-Intervenors Sidmar and Clabecq filed response briefs in opposition to Domestic Producers' motion. After consideration of plaintiffs' arguments and the responses thereto, the Court sustained in part and remanded in part the *Final Determination. Geneva Steel v. United States,* 914 F. Supp. 563, 620 (CIT 1996). The Court's remand instructions ordered Commerce to

> determine whether Cockerill's and Clabecq's common shares were "next most similar publicly traded equity instrument" after the parts bénéficiaries and indicate the record evidence the agency relied upon in reaching its determination; * * *
>
> determine whether Sidmar's conversion of OCPCs to parts bénéficiaries was on terms inconsistent with commercial considerations and indicate the record evidence the agency relied upon in reaching its determination; * * *
>
> recalculate the countervailing duty rate for the conversions of BF 211,835,100 and BF 1.288 billion Clabecq debt held by the Société Nationale pour des Reconstruction des Secteurs Nationaux to ordinary and non-voting preference shares, pursuant to the approval of the Belgian Council of Ministers on December 30, 1983, based on the date of the Government of Belgium's equity infusion; * * *
>
> recalculate the countervailing duty rate for the loan received by Clabecq, which was outstanding as of June 30, 1991, to include the interest rate reduction, resulting from interest rebates, under the Gandois Plan; * * *
>
> determine whether Sidmar's redemption of preferred shares was on terms inconsistent with commercial considerations and indicate

> the record evidence the agency relied upon in reaching its determination; * * *
>
> determine whether the Government of Belgium funding of additional allowance benefits under the Steel CLC bestowed recurring benefits and indicate the record evidence the agency relied upon in reaching its determination; * * *

Id. at 620 (order).

STANDARD OF REVIEW

The standard for this Court's review of a remand determination by Commerce is whether that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (current version at 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)).

DISCUSSION

A. *Basis for Selecting Common Shares as Benchmark for Clabecq's and Cockerill's Parts Bénéficiaries (PBs):*

Commerce explains that the basis for selecting common shares as the next most similar form of publicly traded equity in the case of Clabecq is the "history of the share capital of the company from its incorporation in October 1888 through November 1987." *Redetermination* at 13–14. Commerce found evidence that:

> During the period when PBs were issued, December 3, 1985 through August 13, 1987, Clabecq's capital consisted of 600,000 common shares * * * and 390,353 non-voting preference shares. The non-voting preference shares were not publicly traded. The only shares which were publicly traded were Clabecq's common shares, which were traded on the Brussels stock exchange.

Id. at 14 (citations omitted). Accordingly, Commerce used Clabecq's common shares as the next most similar publicly traded shares for purposes of selecting a benchmark to measure the benefit of the conversion of obligations convertibles participantes et conditionnelles (OCPCs) into PBs.

In the case of Cockerill, Commerce points to Cockerill's annual reports from 1977 through 1991 and the Government of Belgium (GOB) questionnaire response as evidence "that Cockerill had only common shares outstanding when its OCPCs were converted into PBs in 1985." *Id.* Commerce notes Cockerill's 1985 annual report indicates only one type of share—common shares. Furthermore, the GOB response refers to only common shares and PBs in its discussion of dividends, indicating to Commerce preference shares did not exist. Taken together, this evidence led Commerce to conclude Cockerill's common shares were the next most similar publicly traded shares for purposes of selecting a benchmark to measure the benefit, if any, from the GOB's purchase of Cockerill's PBs.

B. *Conversion of Sidmar's OCPCs to PBs:*

Commerce describes the conversion of Sidmar's OCPCs to PBs as follows:

> During the period 1979 through 1983, the GOB assumed the interest costs on Sidmar's medium– and long-term loans taken out prior to 1979. In exchange, Sidmar conditionally issued debt instruments known as OCPCs to the GOB in the amount of the interest assumed. On July 15, 1985, the GOB and Sidmar agreed to convert OCPCs into equity instruments known as PBs.

Id. at 6 (citations omitted). To determine whether an equity infusion is made on terms inconsistent with commercial considerations, Commerce explains it normally "compar[es] the price per share paid by the government to the price per share paid by a private investor participating in the same share issuance." *Id.* at 7 (citation omitted). If no private investor participated in the share issuance, Commerce utilizes the price of publicly traded shares as a benchmark. *See Geneva Steel*, 914 F. Supp. at 571 (describing Commerce's practice of measuring countervailable benefits from government equity infusions).

Because no private investors subscribed to Sidmar's PBs, and because none of Sidmar's shares are publicly traded, Commerce had none of the usual benchmarks by which to determine whether the GOB's equity infusion was on terms inconsistent with commercial considerations. Therefore, Commerce relies on an April 1984 report prepared by the Belgian affiliate of Arthur Young (now Ernst & Young) to derive the value of Sidmar's common shares and thereby determine the appropriate benchmark value.

Commerce explains that "[b]efore comparing the value of a common share * * * with the price paid by the GOB for PBs, we have compared the principal characteristics of Sidmar's common shares and PBs. Specifically, we compared (1) dividend rights, (2) transferability, and (3) voting rights." *Redetermination* at 9. After examining the characteristics of common shares and PBs, Commerce determines, "it is evident that Sidmar's PBs are inferior to its common shares." *Id.* Because Commerce also finds Sidmar's PBs were less valuable than its common shares, the agency adjusted the benchmark price of the common shares to be used in valuing the PBs.[2] When comparing the price the GOB paid for the PBs to the adjusted benchmark price of the common shares, Commerce concludes the GOB's purchase of PBs was on terms inconsistent with commercial considerations and resulted in a countervailable subsidy.

C. *Clabecq's Common Share Price on Date of Equity Infusion:*

In accordance with the Court's remand instructions, Commerce recalculated the benefit bestowed by the GOB's purchase of Clabecq's common and non-voting preferred shares based on the market price of

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[2] For example, after accounting for the difference in the dividend structures of PBs and common shares, Commerce states it "would expect Sidmar's PBs to be valued at 17.5 percent of the value of a common share." *Redetermination* at 12. To account for the difference in voting rights between PBs and common shares, Commerce discounts the benchmark price of PBs by 3 percent.

Clabecq's common shares on May 23, 1985—the date of the debt-to-equity conversion. After comparing the trading price of common shares on day of the conversion to the price the GOB paid for Clabecq's common and non-voting preferred shares, Commerce concluded the GOB paid "more per share than the market price of Clabecq's common shares." *Id.* at 4 (citations omitted). Commerce explains it applied its grant methodology to the overall premium to generate a countervailable subsidy rate for Clabecq.

D. *Interest Subsidy to Clabecq:*

Commerce explains that in accordance with the Court's instructions, it has recalculated the benefit from a loan Clabecq received from the Societe Nationale de Credit a l'Industrie, a public credit institution, taking into account the interest rate reduction applied to that loan. *Id.* at 5. Commerce then calculated the total benefit of the interest reduction during the period of investigation and the resulting countervailing duty rate.

E. *Additional Allowance Benefits Under the Steel Collective Labor Convention as Recurring Benefits:*

In 1978, Belgian steel companies negotiated a collective labor convention (the Steel CLC) in light of the massive restructuring in the steel industry and the large numbers of workers affected. *Geneva Steel,* 914 F. Supp. at 610. Commerce found the Steel CLC conferred a countervailable benefit because, in part, it relieved steel companies of their obligation to pay an additional allowance over and above GOB unemployment benefits that the companies were otherwise required to pay certain laid-off workers. This Court remanded to Commerce for an explanation of evidence Commerce relied upon in determining the GOB's funding of the additional allowance benefits under the Steel CLC bestowed recurring benefits.

In the *Redetermination,* Commerce explains that to determine whether a benefit is recurring, "Commerce considers whether the recipient can expect to receive the benefit on an ongoing basis from review period to review period and/or whether provision of funds by the government need not be approved every year." *Redetermination* at 28 (citation omitted). In this case, Commerce found that when negotiating a collective labor convention, steel firms

> were automatically granted derogations with regard to minimum age, reduction of the notice period, and hiring of replacement workers* * *. Moreover, they were automatically qualified to realize the benefits from the pre-pensioning, including reimbursements from the GOB for additional allowance payments to the separated workers.
>
> In some cases, the additional allowance payments and subsequent reimbursements could be made for a period of up to 15 years. For example, a worker pre-pensioned at the age of 50 would receive payments until normal retirement at age 65. No additional government approvals were required during this time.

> The benefits realized by the steel companies under the Steel CLC were ongoing benefits that were received from review period to review period. In the case of Fabfer * * * benefits were received over a seven-year period—from 1984/85 through 1990/91 (with the exception of 1986/87). For Clabecq, benefits were received over the 13-year period 1980 through 1992.

Id. at 28–29 (citations omitted). Commerce therefore concluded the additional allowance payments "were ongoing payments that the companies received from review period to review period without the need for successive applications and approvals of benefits." *Id.* at 29.

Neither Domestic Producers nor defendant-intervenors challenge any of the aspects of the *Redetermination* discussed above. Accordingly, after review of the *Redetermination* and the evidence underlying Commerce's analysis, the Court holds these aspects of the *Redetermination* are based on substantial evidence and are otherwise in accordance with law.

F. *The Redemption of Sidmar's Preferred Shares:*

1. *Background:*

In 1984, the GOB made two share subscriptions in Sidmar: the first involved the purchase of ordinary shares and the second consisted of the purchase of preferred or preference shares issued in return for the cancellation of certain debt claims held by the SNSN—the GOB agency purchasing the shares—against Sidmar. In 1987, Sidmar redeemed the preference shares:

> "[T]he GOB requested that Sidmar redeem the preference shares early for budgetary reasons. Therefore, in 1989, Sidmar and the GOB agreed to fix the amount due in the year 2004. However, in order to receive some money back immediately, the GOB asked Sidmar to pay the net present value in 1991 for the total due in 2004."

Geneva Steel, 914 F. Supp. at 600 (quoting *Final Determination*, 58 Fed. Reg. at 37,278). Domestic Producers argued in *Geneva Steel* that Commerce erred in concluding Sidmar's redemption of the preferred shares in 1991 did not give rise to a countervailable benefit. With respect to this argument, the Court ordered Commerce on remand to determine "whether Sidmar's redemption of preferred shares was on terms inconsistent with commercial considerations and indicate the record evidence the agency relied upon in reaching its determination." *Id.* at 620 (order).

2. Commerce's *Redetermination:*

To determine whether the redemption was on terms inconsistent with commercial considerations, Commerce examined whether the GOB accepted too low a price for the shares it sold back to Sidmar. If that were the case, Commerce explains, a benefit would have been conferred upon Sidmar. Because Commerce did not have a market-determined price for the shares to use as a benchmark for the redemption, the agency looked to the specific terms of the redemption.

> [T]he GOB faced an uncertain outcome in 2004. First, if the Preferred Shares were redeemed, Sidmar was required to pay the

> [ ] Hence, the return to the government if the shares were redeemed was uncertain. * * * In the 1987 negotiations, the GOB achieved certainty when it agreed with Sidmar to exchange its Preferred Shares for [ ] in 2004. Given the array of possible outcomes in 2004 * * * we find nothing inconsistent with commercial considerations in the GOB's decision to exchange the uncertain return for a certain amount equalling the face value of the shares.

Redetermination at 25 (footnote omitted).

Examining the second step of the 1987 transaction, Commerce states the GOB and Sidmar agreed payment for the shares would be made in 1991, rather than wait until 2004 to redeem the shares at face value.

> This step also potentially involved a government action inconsistent with commercial considerations. Specifically, in paying off in 1991 an amount owed in 2004, it was necessary for the parties to agree upon a [ ]. * * *
>
> Because the [ ] we determined that "the total amount of money received by the GOB was more than what Sidmar should have paid for the Preferred Shares." Had the agreed upon [ ], we would have determined that Sidmar paid too little to redeem its shares in 1991 and that a benefit was conferred. However, given that this was not the case and, indeed, to the contrary that the [ ], we determined that the redemption of Sidmar's Preferred Shares was consistent with commercial considerations.

Id. at 26 (citation omitted).

3. *Contentions of the Parties:*

Domestic Producers argue Commerce erroneously limits its analysis to the *redemption* of Sidmar's preferred shares and fails to examine the *purchase* of the shares, which Domestic Producers contend was on terms inconsistent with commercial considerations. Domestic Producers contend they have consistently alleged the GOB's purchase of Sidmar's preferred shares was on terms inconsistent with commercial considerations. *(See* Domestic Producers' Comments on *Redetermination* (Domestic Producers' Comments) at 6–10.) Domestic Producers also argue Commerce's failure to analyze whether the purchase of preferred shares was inconsistent with commercial considerations is not in accord with *Aimcor v. United States,* 871 F. Supp. 447, 454 (1994), and the "tenor" of the Court's opinion in *Geneva Steel.* Therefore, Domestic Producers allege, the *Redetermination* is not supported by substantial evidence and is not in accordance with law as Commerce has failed to carry out its statutorily imposed mandate to countervail infusions inconsistent with commercial considerations. Accordingly, Domestic Producers request this matter be remanded to Commerce with instructions that Commerce "determine whether the GOB's 1984 purchase of Sidmar's preferred shares was on terms inconsistent with commercial considerations." (Id. at 15.)

Commerce responds Domestic Producers' opposition to the *Redetermination* on this point "constitutes a belated attempt to challenge the agency's original final affirmative countervailing duty determination concerning certain steel products from Belgium." (Def.'s Opp'n to Pls.' Comments on *Redetermination* (Def.'s Opp'n) at 4.) "[N]othing in its complaint or subsequent briefs can reasonably be considered a timely challenge of the terms under which Sidmar issued its Preferred Shares in 1984." *(Id.* at 5 (footnotes omitted).) Furthermore, Commerce argues, the Court specifically directed Commerce to examine on remand "'whether Sidmar's *redemption* of preferred shares was on terms inconsistent with commercial considerations.'" *(Id.* at 4 (citation omitted) (emphasis in Def.'s Opp'n).) The Court could not have been more lucid or explicit, Commerce insists, in setting forth in the remand instructions that Commerce examine only the redemption of Sidmar's preferred shares—not their issuance in 1984. As to the Court's discussion of *Aimcor,* Commerce suggests this "reflects nothing more than the Court's natural desire to appreciate all the facts and nuances" of the matter. (Id. at 9 (citation omitted).)

4. *Discussion:*

Domestic Producers' contention that Commerce erred in the *Redetermination* by not examining the issuance of Sidmar's preferred shares in 1984 and instead only analyzing the redemption of the shares is without merit. First, Domestic Producers did not challenge the issuance of Sidmar's preferred shares in their complaint.[3] Although the pleading requirements of U.S. CIT R. 8(a) are to be construed liberally, the complaint still must provide sufficient notice to defendant as to the claims raised. *See United States v. F.A.G. Bearings, Ltd.*, 8 CIT 294, 297, 598 F. Supp. 401, 404 (1984). In this case, Domestic Producers' complaint does not raise the issuance of Sidmar's preferred shares to SNSN in 1984 as a cognizable cause of action. Nor does Domestic Producers' brief supporting their motion for judgment on the agency record explicitly raise the issue. In their brief, Domestic Producers only argued that Commerce improperly classified the preferred shares as equity and that Commerce "made the further erroneous conclusion that 'the redemption of the preferred shares in 1991 did not give rise to a countervailable benefit.'"[4] *(See* Mem. in Support of Domestic Producers' 56.2 Mot. for J. Upon Agency R. at 30 (footnote omitted); *see also id.* at 25, 31.)

Second, the Court's discussion in *Geneva Steel* and the accompanying order were explicit in directing Commerce to examine on remand the redemption of Sidmar's preferred shares. *See Geneva Steel,* 914 F. Supp.

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[3] In their complaint, Domestic Producers allege, "The Department improperly found that the redemption of Sidmar's preferred shares in 1991 * * * did not give rise to a countervailable benefit." *Geneva Steel v. United States,* No. 93–09–00566 (Complaint ¶ 113); *see also id.* ¶ 114 ("The Department's findings * * * that the redemption of Sidmar's preferred shares in 1991 did not give rise to a countervailable benefit are unsupported by substantial evidence on the administrative record * * *.").

[4] In their reply brief, Domestic Producers argue their case brief "described how the Department failed to countervail the subsidy provided by the GOB to Sidmar through the *issuance* and redemption of preferred shares." (Domestic Producers' Reply Mem. at 9 (emphasis added).) The Court is not persuaded, however, that Domestic Producers' 56.2 brief expressly argued that the issuance of Sidmar's preferred shares was countervailable.

at 603 ("[T]he Court remands * * * to determine whether Sidmar's redemption of preferred shares as equity was on terms inconsistent with commercial considerations * * *."); *id.* at 620 ("[I]t is hereby * * * ORDERED that Commerce shall determine whether Sidmar's redemption of preferred shares was on terms inconsistent with commercial considerations * * *."). There is little room for argument as to the scope of the remand instructions when the instructions are as specific as they were in *Geneva Steel*. Accordingly, the Court finds Commerce complied with the Court's remand instructions and properly confined its remand determination to the redemption of Sidmar's preferred shares.

The Court now turns to Commerce's finding on *Redetermination* that the redemption of Sidmar's preferred shares was consistent with commercial considerations and not countervailable. Although Domestic Producers note "they are troubled by the Department's conclusion," they inform the Court of their decision "to not challenge the Department's finding that the redemption, in isolation, was commercially reasonable." (Domestic Producers' Comments at 4 n.9; *see also id.* at 11 n.19 ("While even in isolation [Commerce's assertion that the redemption of the preferred shares was on terms consistent with commercial considerations] is not altogether accurate, * * * Domestic Producers have not here challenged this point.").) Upon review of the record evidence and the agency's analysis in the *Redetermination* as summarized above, the Court holds Commerce's determination that the redemption of Sidmar's preferred shares was on terms consistent with commercial considerations and did not result in a countervailable event is based on substantial evidence and is otherwise in accordance with law.

CONCLUSION

The Court holds Commerce's *Redetermination* is based on substantial evidence and is otherwise in accordance with law.

SCHEDULE OF CONSOLIDATED CASES

Fabrique de Fer de Charleroi, S.A. v. United States, Court No. 93–09–00599–CVD.

(Slip Op. 96–148)

MAGNESUIM CORP. OF AMERICA, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND JSC AVISMA TITANIUM-MAGNESIUM WORKS, ET AL., DEFENDANT-INTERVENORS

Court No. 95–06–00789

[Commerce's final determination of sales at LTFV sustained in part and remanded in part.]

(Decided August 27, 1996)

Charles M. Darling, IV, William D. Kramer, Gregory D. Shorin, Clifford E. Stevens, Jr. (Baker & Botts, L.L.P.), counsel for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director; *Jeffrey M. Telep,* Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Robert J. Heilferty,* Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel for defendant.

John D. Greenwald (Wilmer, Cutler & Pickering), counsel for defendant-intervenors Avisma Titanium-Magnesium Works and Solikamsk Magnesium Works.

Margaret R. Polito, George W. Thompson (Neville, Peterson & Williams), counsel for defendant-intervenor Hunter Douglas Metals.

Frederick P. Waite, Denise Cheung (Popham, Haik, Schnobrich & Kaufman, Ltd.), counsel for defendant-intervenors Gerald Metals, Inc., Greenwich Metals, Inc., and Hochschild Partners.

OPINION

POGUE, *Judge:* This case is before the Court on a motion for judgment upon the agency record pursuant to USCIT R. 56.2. Plaintiffs, Magnesium Corporation of America, International Union of Operating Engineers, Local 564, and United Steelworkers of America, Local 8319 ("Plaintiffs") bring this action under section 516A of the Tariff Act of 1930 for review of the final affirmative determination of the International Trade Administration of the United States Department of Commerce ("Commerce") that imports of pure magnesium from Russia are sold at less than fair value ("LTFV"). *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation,* 60 Fed. Reg. 16,440 (March 30, 1995) *("Final Determination").*

BACKGROUND

On March 31, 1994, plaintiffs filed an antidumping petition alleging material injury by reason of LTFV imports of pure and alloy magnesium from China, Russia and Ukraine.[1] Thereafter, Commerce initiated antidumping duty investigations. In June 1994 Commerce sent the antidumping questionnaire ("questionnaire") to Berezniki Titanium-Magnesium Works ("Avisma") and Solikamsk Magnesium Works ("Solikamsk") in Russia. Commerce subsequently requested information from 56 potential exporters of Russian magnesium.

[1] On June 22, 1994, The Dow Chemical Company ("Dow") joined the petitioners.

On October 27, 1994, Commerce issued preliminary determination that imports of magnesium from Russia were being sold at less than fair value[2] within the meaning of section 733(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673b(b) (1988).[3]

On March 30, 1995, Commerce published its final determination of LTFV sales for imports of magnesium from Russia.[4] Commerce reaffirmed its conclusion in the preliminary determination that Russia is a nonmarket economy country ("NME"). Commerce determined that Avisma did not make direct exports of magnesium to the United States during the period of investigation ("POI"), and that Solikamsk did make direct exports and qualified for a separate rate, which Commerce set at zero. Certain reseller/exporters, i.e. AIOC Corporation ("AIOC"), Gerald Metals, Inc. ("Gerald Metals"), Greenwich Metals ("Greenwich"), Hunter Douglas Metals ("HDM"), Hochschild Partners ("Hochschild"), Interlink Metals and Chemicals, S.A. ("Interlink"), MG Metals ("MG"), and Razno-Alloys, Ltd. ("Razno"), received zero or *de minimis* dumping margins. Commerce also established a 100.25 percent "All Others" rate based on best information available ("BIA"), which applied to all exporters not assigned an individual rate. This rate would also apply to reseller/exporters which received an individual rate, if they were to sell magnesium produced by a Russian producer different from the producer from which they exported magnesium to the United States during the POI.

Commerce issued its Antidumping Duty Order, together with an Amended Final Determination on May 8, 1995.[5]

In the related proceeding before the International Trade Commission ("Commission"), the Commission determined that the domestic industry was materially injured by reason of imports of pure magnesum from China, Russia and Ukraine.[6]

This action presents the following issues:

1. Whether Commerce's use of Brazilian raw dolomite to establish a surrogate value for concentrated carnallite rather than for raw carnallite is supported by substantial evidence, and otherwise in accordance with law?

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[2] *Notice of Preliminary Determinations of Sales at Less Than Fair Value and Postponement of Final Determinations: Pure and Alloy Magnesium From the Russian Federation*, 59 Fed. Reg. 55,427 (1994) (*"Preliminary Determination"*).

[3] Section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b (1988). The Uruguay Round Agreement Act ("URAA"), Pub. L. No. 103-465, tit. II, 108 Stat. 4809, 4842 (1994), amended the antidumping laws. These amendments, however, do not apply to investigations initiated before January 1, 1995, *id.* at § 291(a)(2), (b), which are thus regulated by the pre-existing law. Accordingly, this Court refers to the antidumping statute in effect prior to January 1, 1995. For simplicity, the Court speaks in the present tense when referring to the pre-existing statute.

[4] *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium from Ukraine*, 60 Fed. Reg. 16,432 (March 30, 1995) (*"Final Ukraine Determination"*); *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the People's Republic of China*, 60 Fed. Reg. 16,437 (March 30, 1995) (*"Final China Determination"*); *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 Fed. Reg. 16,440 (March 30, 1995) (*"Final Russia Determination"*).

Commerce assigned margins ranging from 79.87 to 104.27 percent to subject imports from Ukraine, from zero to 100.25 percent to subject imports from Russia, and 108.26 percent to subject imports from China. *Final Russia Determination* at 16,449-50.

[5] *Notice of Antidumping Duty Orders: Pure Magnesium From the People's Republic of China, the Russian Federation and Ukraine; Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Order Investigation of Pure Magnesium from the Russian Federation*, 60 Fed. Reg. 25,691 (1995).

[6] *Magnesium from China, Russia, and Ukraine*, 60 Fed. Reg. 26,456-57 (Int'l Trade Comm'n, May 17, 1995) (final).

2. (a) Whether Commerce's calculation of the surrogate value for electricity used in the production of magnesium is supported by substantial evidence, and otherwise in accordance with law?

(b) Whether Commerce violated plantiffs' due process rights when it relied on an outside expert's consultation which plaintiffs could not review?

3. Whether Commerce's determination to value factory overhead costs using a Brazilian silicomanganese producer's factory overhead as a surrogate value, and without including an adjustment reflecting the electrolytic cell rebuild costs incurred by petitioner MagCorp, is based on substantial evidence, and otherwise in accordance with law?

4. Whether Commerce properly used a Brazilian surrogate value to calculate the Russian producers' selling, general and administrative expenses ("SG&A")?

5. Whether Commerce's calculation of by-product credits to the Russian producers' cost of manufacturing magnesium without reducing the value of the by-product credits by the after separation processing costs is supported by substantial evidence, and otherwise in accordance with law?

6. Whether Commerce's reliance on sales information reported by Razno, Interlink and AIOC immediately prior to verification is consistent with existing Commerce precedent, supported by substantial evidence on the record, and otherwise in accordance with law?

7. Whether Commerce's exclusion of resellers' SG&A from the calculation of foreign market value ("FMV") is consistent with existing Commerce precedent, supported by substantial evidence, and otherwise in accordance with law?

8. (a) Whether Commerce's refusal to deduct from USP the export taxes paid by Russian producers to the Russian government is in accordance with law?

(b) Whether the exchange rate balancing requirement, to which Russian producers were subject, represents an implied export tax that should be deducted from USP?

STANDARD OF REVIEW

The Court will uphold a Commission determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). The court may not substitute its judgment for that of the agency. *See Matsushita*, 750 F.2d at 936. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

When Commerce's interpretation of the antidumping statute is challenged, this court applies the two step analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984): Using the traditional tools of statutory construction the court ascertains whether congressional intent on the disputed issue is clear, and, if clear, the court applies the statute in the manner Congress intended, regardless of the agency's position.[7] If the statute is ambiguous, the court, rather than interpreting the statute anew and rendering its own interpretation, must defer to an administrative agency's "permissible construction of the statute,"[8] whether that construction manifests itself in the application of the statute, *see, e.g., Daewoo Electronics Co., Ltd. v. International Union of Electronic Elec., Technical, Salaried and Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 2672 (1994), or in the promulgation of a regulation, *see, e.g., Smith Corona Group v. United States*, 1 Fed. Cir. (T) 130, 136, 713 F.2d 1568, 1575 (1983), *cert. denied*, 465 U.S. 102 (1984). This deference is at its greatest level on issues involving Commerce's technical expertise in interpreting the antidumping statute it administers. *Fujitsu General Ltd. v. United States*, No. 95–1343 at 8 (Fed. Cir. July 3, 1996).

DISCUSSION

This case involves the review of Commerce's final determination in the investigation of exports of pure magnesium from the Russian Federation ("Russia") to the United States.[9] Commerce determined that Russia is a nonmarket economy ("NME").[10] The prices of the goods produced in an NME are subject to discrepancies which distort their value. Consequently, the antidumping statute provides that, in such cases, Commerce calculates the foreign market value ("FMV") of the merchandise "on the basis of the value of the factors of production utilized in producing the merchandise * * *." 19 U.S.C. § 1677b(c) (1988).[11] Commerce utilizes, "to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4).

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[7] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[8] *Id.* at 843 ("If * * * the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[9] *Final Determination of Sales at Less Than Fair Value: Pure Magnesium from the Russian Federation*, 60 Fed. Reg. 16,440 (1995) ("Final Determination"), Public Document ("Pub. Doc.") 347 (Administrative Record ("A.R.") Fiche No. 66 at 85).

[10] *Final Determination*, 60 Fed. Reg. at 16,443. The determination remains in effect until revoked. 19 U.S.C. § 1677(18) (1988).

[11] "[T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country * * *." 19 U.S.C. § 1677b(c)(1).

In their petition, plaintiffs proposed Brazil as the appropriate surrogate market economy for Russia.[12] Commerce selected Brazil because it "is the only country that produces magnesium and is comparable in terms of per capita GNP to Russia."[13] To determine the FMV of magnesium, Commerce calculated surrogate values for the factor-of-production inputs (including raw materials, labor, and energy) using the Brazilian magnesium industry. Commerce then multiplied these values by the quantities reported by the Russian producers and exporters.[14] A factory overhead figure was also included in the FMV calculation, and certain by-product offsets were granted against the cost of manufacturing. Finally, Commerce added an amount for general expenses and profit, the cost of containers and coverings, and other expenses incidental to the shipment of the merchandise to the United States.[15]

1. *Carnallite v. Dolomite:*

Avisma and Solikamsk use concentrated carnallite as the basic feedstock in the production of magnesium.[16] In their antidumping petition, plaintiffs were unable to determine a value for carnallite in Brazil, because the Brazilian magnesium industry utilizes dolomite instead of carnallite.[17] Plaintiff therefore proposed a price of raw dolomite as a good surrogate value for raw carnallite. In its final determination, Commerce used the price of raw dolomite in Brazil[18] as the surrogate value for concentrated carnallite, because it had no surrogate value information for concentrated carnallite, and because concentrated carnallite and raw dolomite have a comparable content of magnesium.[19]

Plaintiffs criticize Commerce's use of a raw material, raw dolomite, to value a processed material, concentrated carnallite. Plaintiffs do not challenge the use of raw dolomite as a surrogate value. However, plaintiffs argue that raw dolomite is similar to *raw* carnallite, whereas the value relevant to the factor-of-production calculation is *concentrated* carnallite. Therefore, plaintiffs contend, Commerce should have adjusted the value of raw dolomite by adding the processing costs incurred to convert raw carnallite into concentrated carnallite.[20] Plain-

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[12] Antidumping Petition, Pub. Doc. 1 (A.R. Fiche No. 2 at 44).

[13] Policy Office Memorandum (Oct. 21, 1994), Pub. Doc. 150 (A.R. Fiche No. 34 at 46).

[14] *Final Determination*, 60 Fed. Reg. at 16,443.

[15] *Id.*

[16] Raw carnallite, a potassium-based material, is refined into concentrated carnallite, which is the feedstock for the electrolytic cells in which magnesium is produced.

[17] Plaintiffs' Reply Brief at 65.

[18] Commerce calculated raw dolomite at $6.75 per metric ton ("MT"), a price which plaintiffs provided. Letter from Baker & Botts L.L.P. (April 14, 1994), Pub. Doc. 5 (A.R. Fiche No. 8 at 1).

[19] The magnesium content of raw dolomite is 50% greater than the magnesium content of raw carnallite. It takes 1.5 units of raw carnallite to produce 1 unit of concentrated carnallite. Letter from Baker & Botts, L.L.P., Exhibit 4 (January 13, 1995), Prop. Doc. 91 (A.R. Fiche No. 116 at 1).

[20] In addition, plaintiffs contend that SG&A expenses, profit, and overhead expenses must also be added to input costs, because Russian magnesium producers purchase the carnallite from others.

tiffs claim that Commerce has usually allowed adjustments to surrogate country values when necessary to reach an accurate determination.[21]

Despite plaintiffs' claim, the administrative record does not indicate a surrogate value for concentrated carnallite, because this material is not used in Brazil, the surrogate country. Commerce's use of raw dolomite was reasonable because its magnesium content is comparable to that of concentrated carnallite. The statute permits Commerce the use of "comparable merchandise" for valuing a raw material input as a basis for foreign market value.[22] Moreover, it is reasonable to conclude that the cost associated with processing raw dolomite into a suitable feedstock is included in factory overhead for the Brazilian industry.[23] Commerce's determination is therefore supported by substantial evidence on the record, and otherwise in accordance with law.

Plaintiffs argue at length that they placed evidence on the record describing the Soviet method for producing artificial carnallite from raw carnallite.[24] Based upon this information, plaintiffs claim that they

> were able to estimate that the surrogate value for concentrated carnallite was $15.32 per MT for Avisma and $17.84 per MT for [Solikamsk]. The reasonableness of these calculations is shown by a commercial proposal by Silvinit, a Russian metals trade from whom [Solikamsk] purchased concentrated carnallite * * * [which] states * * * an export price of 22.59 per MT.[25]

The Court recognizes that in applying the factors of production methodology to a nonmarket economy country Commerce has discretion to take a combined approach and to consider actual costs paid by the NME producer for each factor of production, if Commerce finds that such actual costs represent the best information available. *Lasko Metal Prod-*

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[21] Plaintiffs cite *Ferrovanadium from the Russian Federation*, 60 Fed. Reg. 27,957, 27,958 (May 26, 1995); *Tapered Roller Bearing from Romania*, 52 Fed. Reg. 17,433, 17,437 (1987).

[22] 19 U.S.C. § 1677b(c)(2) provides:

> If the administering authority finds that the available information is inadequate for purposes of determining the foreign market value of merchandise under paragraph (1), the administering authority shall determine the foreign market value on the basis of the price at which merchandise that is—
>
> (A) comparable to the merchandise under investigation, and
>
> (B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country,
>
> is sold in other countries, including the United States.

The legislative history indicates that *comparable* merchandise is "a broader category than the 'such or similar' merchandise comparison which is usually used." S. Rep. No. 71, 100th Cong., 1st Sess., at 106 (1987). Consequently, "comparability" as used in the surrogate methodology has a wider meaning than "comparability" as used in the production process, where the term implies that the surrogate merchandise could be *substituted* for concentrated carnallite. The foregoing analysis answers plaintiffs' contention that raw dolomite is not comparable to concentrated carnallite. (Plaintiffs' Memorandum at 95–99.)

[23] The Court notes that the *significant processing costs required to convert raw carnallite into concentrated carnallite*, which plaintiffs are agitating for as a basis for their claimed adjustment, were directly contested by defendant-intervenors Avisma and Solikamsk. During the investigations, in fact, defendant-intervenors Avisma and Solikamsk noted that

> [p]etitioners overstate that cost [of processing raw carnallite into carnallite concentrate] by citing the cost of producing artificial carnallite rather than the mechanical dressing of native carnallite. Even so, the process for producing artificial carnallite is a simple operation (as is reflected in the 10 KwH of electricity that Petitioners' claims [sic] are required). Valuing the 10KwH factor cost * * * adding factory overhead (22 percent), SG&A (12 percent) and profit (8 percent) yields an additional carnallite concentrate cost of $0.36 per ton."

Letter from Wilmer, Cutler & Pickering at 12 n. 8 (January 27, 1995), Pub. Doc. 281 (A.R. Fiche No. 57 at 12). Plaintiffs erroneously define this statement as an admission. (Plaintiff's Reply Brief at 67–68.)

[24] Plaintiffs' Reply Brief at 65, referring to Petitioners' Supplemental Publicly Available, Published Information ("PAPI") Submission at Exhibit 4A, Prop. Doc. 91 (A.R. Fiche No. 116 at 1).

[25] *Id.* at 65–66, referring to Petitioners' Supplemental PAPI Submission at Exhibit 5, Prop. Doc. 91 (A.R. Fiche No. 116 at 1).

ucts, Inc. v. United States, 43 F.3d 1442, 1445–46 (Fed. Cir. 1994). In the case of the Russian magnesium producers, the combined approach would allow Commerce to use the market cost of concentrated carnallite—if available and if verified as accurate. Commerce's regulations provide that, if such or similar merchandise is not produced in the surrogate country, Commerce "may calculate the foreign market value using constructed value based on factors of production incurred in the home market country * * * if the Secretary obtains and verifies such information from the producer of the merchandise in the home market country." 19 CFR § 353.52(c) (1995).

The producers of concentrated carnallite were not under investigation here because Russian magnesium producers purchase their concentrated carnallite from unrelated Russian suppliers.[26] Therefore, neither calculation nor verification was at issue in the proceeding.

Plaintiffs are not claiming that Commerce should account for the actual cost paid by the Russian producers to purchase concentrated carnallite. Rather, plaintiffs seek to calculate the value for concentrated carnallite partly based on the surrogate value of raw dolomite, and partly based on unverified information about the Soviet method of production. Such a methodology would calculate the surrogate value of concentrated carnallite by comingling the surrogate value for raw carnallite (the value of Brazilian raw dolomite) with *estimated* Russian costs related to converting raw carnallite into concentrated carnallite. In following this methodology, plaintiffs point to their own estimated Russian costs and claim that Commerce should make the appropriate adjustments which reflect such costs.

Plaintiffs' methodology is not codified anywhere in the statute, and would be an aberration within the factors-of-production methodology for an NME country.

2. *Electricity:*

The magnesium production process is electricity intensive.[27] Commerce stated that it would prefer to use publicly available, published information ("PAPI") from Brazil in order to determine which surrogate value to use for electricity,[28] but such information was unavailable for purposes of its preliminary determination. Initially, therefore, Commerce used information gained from a staffperson at the U.S. Consulate in Belo Horizonte, Brazil.[29]

The surrogate value for electricity was calculated to be at $0.055 per kWh, a simple average of the reported $/kWh rates for industrial use in Brazil.[30] Commerce then requested that the parties provide factor price

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[26] Avisma Sections C and D Response at D–3, Prop. Doc. 17 (A.R. Fiche No. 78 at 1); Solikamsk Sections C and D Response at D–3, Prop. Doc. 18 (A.R. Fiche No. 79 at 1).

[27] This fact is undisputed.

[28] *Preliminary Determination*, 59 Fed. Reg. at 55,430.

[29] Preliminary Determination Calculation Memorandum, Pub. Doc. 163 at 3 (A.R. Fiche No. 37 at 1). Belo Horizonte is the city where Brasmag, Brazil's sole magnesium producer, is located.

[30] *Id.*

data.[31] The Russian respondents provided PAPI for Brazilian large industrial users, such as magnesium or aluminum producers.[32] Plaintiffs did not submit any PAPI data for electricity, but commented on Russian respondents' submissions.[33]

In its *Final Determination,* Commerce decided that the Brazilian "large industry user" rate should apply and that the value for electricity should therefore be $0.0235/kWh.[34] Commerce noted that the electricity consumption of Avisma and Solikamsk "was significantly higher than the minimum necessary to receive the lowest rate in Brazil."[35] Commerce also requested advice from a private firm, CSA Energy Consulting ("CSA"), on the relationship between rates and electricity consumption, and between electricity consumption and line tension.[36]

Upon learning that Commerce had consulted CSA, plaintiffs also contacted CSA and solicited its advice, providing it with a copy of the Brazilian tariff schedules.[37] Then, based on the results of their own consultation contained in a letter sent by another CSA official, Mr. Palermo, plaintiffs requested correction of ministerial errors allegedly contained in the final determination.[38] Commerce rejected plaintiffs' allegations.[39]

Plaintiffs now contend that the Brazilian tariff schedules used by Commerce were not the tariffs of CEMIG (which supplies electricity to Brasmag, the local magnesium producer), which has only two rates, domestic and industrial. The tariffs used by Commerce, instead, reported customer rates varying according to the tension of the line, where the lowest rate of 2.3 cents per kWh corresponds to a tension line of 230 kV. A line of 230kV, plaintiffs argue, is far more than Russian pro-

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[31] Request for Factor Valuation Data (Dec. 5, 1994), Pub. Doc. 206 (A.R. Fiche No. 43 at 95).

[32] Respondents' PAPI Submission, Pub. Doc. 263 (A.R. Fiche No. 54 at 1). Respondents submitted (1) electricity rates published in the *Diario Oficial* (Brazil's equivalent of the Federal Register); (2) the *Tariff Bulletin* published by the Ministry of Mines and Energy of Brazil, also containing the electricity rates provided by Electrobras, the Brazilian supplier; (3) the *American Metal Market*, which reported that Brazilian large producers of aluminum paid between $0.022 and $0.026 per kWh. *Id.* at 8–10.

[33] Plaintiffs' Reply to PAPI Submission, Pub. Doc. 282 (A.R. Fiche No. 57 at 44). Plaintiffs submitted new information about electricity rates obtained from the U.S. Consulate in Belo Horizonte, Brazil, objecting that the submitted PAPI was not specific enough to value electricity. The Consulate reported that a local gold mining company paid $53.00/mWh, and that the same rate probably applied to Brasmag, the local magnesium producer. The Consulate also stated that CEMIG, the local electricity company, has only two rates, domestic and industrial. *Id.* at Annex B.

[34] *Final Determination*, 60 Fed. Reg. at 16446.

[35] *Id.* Commerce explained that the rate was the one applied to Brazilian companies within electricity-intensive industries similar to that of magnesium producers. Final Calculation Memorandum, Prop. Doc. 135 at 3 (A.R. Fiche No. 127 at 3).

[36] Commerce's Final Calculation Memorandum reads:

> Ms. Lynda White, Manager with CSA Energy Consulting, explained to DOC official that kVA are [sic] kW are figures used to measure demand and are roughly equivalent. She also explained that periodic kWH use could be divided by the number of hours in the period to get an approximation of the kW capacity of a user. She indicated that a user with demand of around 20,000 kW would likely be charged the lowest rate that a utility offered, and that a rate of 230 kV seemed appropriate for such a user.

Id.

[37] Commerce had not provided CSA with the exact figures because of the proprietary nature of such information. (Defendant's Memorandum in Opposition to Plaintiffs' Motion at 11.)

[38] Ministerial Error Allegation, Pub. Doc. 351 (A.R. Fiche No. 67 at 11). In its letter to plaintiffs, CSA declares that "the statement regarding the voltage level service [i.e., a rate of 230kV] would be taken as incorrectly quoted. [CSA] * * * had expected this phrase to be removed." Petitioners' Letter of April 10, Attachment 1, Prop. Doc. 137 (A.R. Fiche No. 128 at 17).

[39] Ministerial Error Memorandum, Pub. Doc. 355 (A.R. Fiche No. 67 at 51).

ducers would need.[40] Plaintiffs refer to the consultation that *they* received from CSA, where Mr. Palermo indicated that "[a]n industrial customer with a peak load of about 20,000 kw would take service" on A3a or A4 rates, which are more expensive than the A1 rate.[41] All these errors were brought to Commerce's attention in the ministerial error submission.

Plaintiffs' alleged errors, however, are immaterial because Commerce did not rely on the CSA statement in making its final determination. Instead, Commerce relied on PAPI provided by the Russian respondents on Brazilian electricity rates;[42] this is Commerce's preferred methodology for valuing factors of production.[43] The record shows that the production of aluminum is electricity intensive, and that in this regard the aluminum industry is comparable to the magnesium industry.[44] Based on the tariff schedules and an article from the "American Metal Market" which reported the electricity rates charged to the largest industrial producers of aluminum, Commerce averaged the A1 rate for each month during the POI, and determined the surrogate value for electricity to be $0.0234 per kWh.

The critical issue, however, is whether the magnesium industry requires enough electricity to qualify for the lowest rate, A1, as applied by Commerce. The record indicates that it does. Commerce asserts that it had verified that both Avisma and Solikamsk used very large amounts of electricity,[45] and that the electricity rate charged to Brazilian large users is the A1 rate. Electricity constitutes a large portion of the costs incurred in the production of magnesium. Based on the evidence on the record, it is reasonable to conclude that magnesium producers use electricity at the lowest rate available. Moreover, record evidence also shows that a planned magnesium investment in Brazil would have an energy line of 230kV.[46] Finally, no evidence indicates that the lowest rate was

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[40] Plaintiffs argue that all the evidence refers to aluminum producers, which on average use several times more electricity than Avisma or Solikamsk. Plaintiffs also contend that the record showed that the application of the lowest tariffs required a special deal, and that the only aluminum producer to receive the lowest rate was one who agreed to pay for two years in advance.

[41] Petitioners' Letter (April 10, 1995), Attachment C, Prop. Doc. 137 (A.R. Fiche No. 128 at 17). Nevertheless, Mr. Palermo's views do not specifically refer to Brazil, and are limited to users with a *peak* 20,000 kWh demand, whereas Avisma and Solikamsk's *minimum* demand is 20,000 kWh.

[42] Respondents' PAPI Submission, Pub. Doc. 263 (A.R. Fiche No. 54 at 1).

[43] *See Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China*, 57 Fed Reg. 21,058, 21,062 (1982) (Comment 4). In this determination, Commerce articulated the reasons for preferring PAPI to information obtained from embassies and consulates. Commerce explained that the quality of data obtained from embassies and consulates was inconsistent, and a cause of difficulty in determining which was the most reliable. Moreover, the preference given to PAPI increased the certainty and predictability of Commerce's valuations, limited unnecessary delays in the course of the investigations, and alleviated the burden on embassies and consulates caused by requests for data. *Id.*

[44] In the absence of detailed data on the subject merchandise, Commerce can use data on "comparable merchandise." *See* S. Rep. No. 71, 100th Cong., 1st Sess., at 106 (1987). Plaintiffs themselves refer to and rely on the aluminum industry to value the factors of production. *See* Plaintiff's' Factor Submission, Pub. Doc. 264 at 2 (A.R. Fiche No. 55 at 2) ("As indicated in the Department's Policy Memorandum, aluminum is the most comparable product to magnesium. Policy Memorandum at 2 * * *. According to MagCorp's product expert, the aluminum industry is the most comparable industry to the magnesium industry in terms of production processes, costs * * *.").

[45] Commerce reached this conclusion mainly considering Avisma and Solimansk's minimum peak demand.

[46] Antidumping Petition, Volume II Constructed Value, Exhibit 5, Annex G at 1–3, Pub. Doc. 1 (A.R. Fiche No. 2).

normally granted only upon "special deals," as plaintiffs object.[47] Consequently, Commerce's determination is based on substantial evidence on the record.

Plaintiffs also claim that Commerce's use of CSA's consultation violated their due process rights, because they were not given any notice nor opportunity to comment.[48]

Commerce did not inform plaintiffs of its request to CSA and did not give plaintiffs any opportunity to review CSA's findings prior to the final determination. It is evident, though, that plaintiffs had been aware of the question submitted to CSA since January 13, 1995, when the Russian respondents submitted the PAPI of electricity rates in Brazil, and that plaintiffs had full opportunity to respond and contest the data.[49] Moreover, even though Commerce may seek corroboration from an outside expert on information already on the record, CSA's opinion was not material to the final decision. In fact, Commerce issued its final determination before receiving any response from CSA.

Thus, Commerce did not rely on CSA's consultation in its determination. Commerce, in fact, reported CSA's statement using a patently incorrect electrical terminology.[50] The Court is persuaded that such a statement could not possibly have been the basis of Commerce's decision without creating dramatic abnormalities within the decision itself. The decision contains no such abnormalities.

The cases cited by plaintiffs are inapposite. In *PPG Industries v. United States,* 13 CIT 183 (1989), in particular, this court reviewed Commerce's attempt to include in the record a document containing information on which Commerce had relied and which formed the basis for the final decision. In the present case Commerce sought confirmation from an outside expert with regard to information already on the record. CSA's consultation, therefore, was immaterial to Commerce's determination. Commerce relied on its own expertise and reached the same conclusion based on evidence on the record.

The fact pattern of the present case is similar to that in *Timken v. United States,* 12 CIT 955, 699 F. Supp. 300 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990). In *Timken,* plaintiff claimed denial of due process alleging that it had not been provided with an opportunity to comment on a telex Commerce received eight days before publication of its final deter-

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[47] Plaintiffs rely only on the 1987 Metals Week article which simply reports that in 1987 Brasmag, the Brazilian magnesium producer, "had not been granted *special concessions* similar to those enjoyed by aluminum producers *in the Amazon region.*" Plaintiffs' Reply to PAPI Submission, Pub. Doc. 282 at Annex 1 (A.R. Fiche No. 57 at 44) (emphasis provided).

[48] Plaintiffs cite *Sigma Corp. v. United States,* 17 CIT 1288, 1304–05, 841 F. Supp. 1255, 1268 (1993) (holding that failure to give notice or opportunity for comment on a change in rates made between the preliminary and the final results amounts to violation of due process); *Lois Jeans & Jackets, U.S.A., Inc. v. United States,* 5 CIT 238, 243–44, 566 F. Supp. 1523, 1527–28 (1983) (holding that absence of notice that a ruling was under reconsideration, ruling that is subsequently reversed, denied plaintiff opportunity to comment, and constitutes deprivation of due process); *PPG Indus. v. United States,* 13 CIT 183, 190, 708 F. Supp. 1327, 1332 (1989) (holding that failure to give plaintiff notice and opportunity to comment on a document which Commerce sought to add to the record after its final determination, and on which it relied, could violate due process rights).

[49] The Brazilian tariff schedules, and the applicability of the lowest A1 rate to Avisma and Solikamsk, were also discussed at the administrative hearing. Hearing Transcript, Pub. Doc. 326 at 72–75, 93–99 (A.R. Fiche No. 64 at 1).

[50] See footnotes 36, 38.

mination. The court rejected plaintiff's claim because record evidence showed plaintiff's full involvement in the investigation, where it "received and submitted data on contested matters, participated in public hearings, and filed briefs." *Id.* at 309.[51] Similarly, this Court rejects plaintiffs' claim of violation of due process rights.

3. *Factory Overhead:*

Factory overhead represents the indirect manufacturing costs that a company incurs. Included in factory overhead are costs such as depreciation, insurance, taxes, repairs and maintenance, supervisory salaries, manufacturing supplies, power, and indirect labor.[52] The value for factory overhead is generally calculated as a percentage of manufacturing costs.[53] For its calculation of factory overhead, Commerce relied on data taken from another antidumping investigation on a Brazilian silicomanganese producer, and calculated the surrogate value for factory overhead at a 22 percent rate.[54]

Plaintiffs indicate that the magnesium industry uses electrolytic cells which must be rebuilt every 450–600 days, whereas silicomanganese furnaces last five to seven years. Furthermore, plaintiffs assert that the electrolytic cells used to produce magnesium require continuous maintenance because of the nature of the materials employed, whereas silicomanganese furnaces require minimal repair costs.[55] Thus, plaintiffs contend that Commerce should have adjusted the factory overhead costs of silicomanganese producers upward in order to account for the higher costs in the production of magnesium. According to plaintiffs, absent any appropriate surrogate information on factory overhead in the Brazilian magnesium industry, Commerce should have used petitioners' experience to value the cell rebuild overhead costs, as it has done in similar circumstances in the past.[56] By adding MagCorp's electrolytic cell rebuild expense rate, plaintiffs claim, Commerce should have reached a total factory overhead rate that is far higher than 22 percent.

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[51] *See also NTN Bearing Corp. v. United States*, 15 CIT 75, 83, 757 F. Supp. 1425, 1433 (1991) ("Plaintiffs' active participation in the hearing and submission of briefs on the issue * * * as well as their repeated correspondence with the ITA on this issue, belie their claim that they were denied due process rights * * *."), *aff'd*, 979 F.2d 1355 (Fed. Cir. 1992); *NAR S.p.A. v. United States*, 13 CIT 82, 91, 707 F. Supp. 553, 561 (1989) ("[A] plethora of communications took place between NAR and Commerce throughout the administrative proceedings, rendering suspect NAR's assertion that it did not understand or perceive the actions Commerce took.").

[52] Charles T. Horngren & George Foster, *Cost Accounting, A Managerial Emphasis* 29 (Prentice-Hall, Inc., Englewood Cliffs, NJ) (6th ed. 1987); Wayne J. Morse & Harold P. Roth, *Cost Accounting: Processing, Evaluating, and Using Cost Data* 29 (Addison-Wesley Publishing Company) (Third ed. 1986).

[53] *See, e.g., Final Determination of Sales at Less Than Fair Value: Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Hungary*, 52 Fed. Reg. 17428, 17429 (May 8, 1987).

[54] Prelim. Calc. Memorandum, Pub. Doc. 163 at 4 (A.R. Fiche No. 37 at 1). The factory overhead calculations did not include energy (electricity, heavy oil, natural gas), which was calculated separately. *Id.*

[55] Letter from Baker & Botts, L.L.P. to Commerce (January 10, 1995), Neelameggham Affidavit at 2, Prop. Doc. 88 (A.R. Fiche No. 115 at 1).

[56] Plaintiffs indicate that Commerce has routinely made adjustments to surrogate factory overhead rates, and has accordingly excluded or included inputs that have or have not already been calculated as separate factors. The determinations cited by the plaintiffs, however, report cases where Commerce adjusted surrogate country data to exclude indirect cost elements that the NME producer had already reported as *direct* costs. The adjustments, therefore, were warranted to avoid double-counting a production factor. Indeed, in this case Commerce excluded energy costs, which were accounted for separately, from the factory overhead percentage. Prelim. Calc. Memorandum, Pub. Doc. 163 at 4 (A.R. Fiche No. 37 at 1).

Commerce counters that the factors-of-production analysis is complex, especially when examining a particularly complicated production process like the one used in the magnesium industry.[57] Consistent with its usual practice,[58] Commerce rejected an "item-by-item evaluation of overhead components," and instead calculated factory overhead as a percentage of the total cost of manufacturing. Commerce maintains that no data were available on magnesium production in Brazil, so it resorted to the best information publicly available on silicomanganese production in Brazil as surrogate value.[59]

Quite correctly, Commerce explained that "[f]actory overhead is a combination of elements, some of which may be more or less expensive depending on the product or even the company."[60] Factory overhead reported by MagCorp is composed of cell rebuilds, maintenance materials, plant supplies, depreciation, and other fixed overhead.[61] Factory overhead reported by the Brazilian silicomanganese producer, conversely, is composed of costs for labor, contractors, indirect materials, maintenance, rents, others, amortizations, insurance, depreciation, power—demand, and power—auxiliaries.[62] The discrepancy stems from different cost accounting methods rather than different overall factory overhead costs. Cost accounting is characterized by its multiple methodologies, which although different may all be appropriate.

The discrepancy in cost accounting methodologies for factory overhead determines the differences at issue here. Even if electrolytic cell rebuild costs in the magnesium industry are higher than the correspondent costs in the silicomanganese industry, there may be other costs in the silicomanganese industry factory overhead which are higher than in the magnesium industry.[63] This might result from the adoption of different, even though equally acceptable, accounting methodologies, which are inconsistent with one another (i.e., in the depreciation of fixed costs). There is no evidence on the record that MagCorp's method of allocating inventory better reflects the subject NME country realities or the experience of any Brazilian magnesium producer.

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[57] The complexity of this methodology was recognized by Congress, S. Rep. No. 71, 100th Cong., 1st Sess., at 106 (1987), and ratified by the courts which defined the statutory mandate given to Commerce to require a "reasonable, good faith effort to obtain information," *Timken Co. v. United States*, 788 F. Supp. at 1219.

[58] *See Final Determination of Sales At Less Than Fair Value: Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the Socialist Republic of Romania*, 52 Fed. Reg. 17,433, 17,436 (1987).

[59] Prelim. Calc. Memorandum, Pub. Doc. 163 at 4 (A.R. Fiche No. 37 at 1). These data offered the additional advantage of relating to the same POI of this case.

[60] *Final Determination*, 60 Fed. Reg. at 16,447, Pub. Doc. 347 (A.R. Fiche No. 66 at 92). Plaintiffs claim that these arguments constitute mere speculations not based on any record evidence. The Court disagrees for the reasons explained in the opinion.

[61] Letter from Baker & Botts, L.L.P. to Commerce (April 7, 1994) at Appendix A, Prop. Doc. 2 (A.R. Fiche No. 73 at 1).

[62] Prelim. Calc. Memorandum, Exhibit E, Pub. Doc. 163 at 4 (A.R. Fiche No. 37 at 1).

[63] Plaintiffs contend that Commerce did not point to evidence indicating that some of the elements in the silicomanganese factory overhead were actually more expensive than similar elements in the magnesium factory overhead, and that this circumstance was sufficient to offset the higher costs related to the electrolytic process. Absent any such indication, plaintiffs claim that Commerce should have considered rebuilding electrolytic cells as a capital cost, and as such included it in the constructive value ("CV"). In fact, "[t]he factors of production utilized in producing merchandise include, but are not limited to—* * * (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3) (1988). Plaintiffs' arguments ignore the fact that they, not Commerce, bear the burden to point to evidence indicating that Commerce's determination is unsupported by substantial evidence, or otherwise not in accordance with law.

Commerce "utilize[d], to the extent possible, the prices or costs of factors of production in one * * * market economy countr[y] * * * at a level of economic development comparable to that of the nonmarket economy country."[64] Adhering to the statutory mandate, Commerce used factory overhead data taken from an investigation of a Brazilian silicomanganese producer,[65] because the Brazilian data were deemed to reflect an experience close to that of magnesium producers in the subject NME countries.[66] In addition, the Brazilian data offered the advantage of referring to the same period of investigation.

It is Commerce's standard practice to disregard petitioners' costs because they are not "an appropriate benchmark by which to test the accuracy of surrogate country values."[67] While in an extraordinary circumstance—such as an absolute lack of information—it would be appropriate for Commerce to refer to petitioners' data, plaintiffs have not demonstrated that such a circumstance exists in this case. Commerce may use considerable discretion in the evaluation of factors of production. *See Technoimportexport v. United States*, 16 CIT 13, 14, 783 F. Supp. 1401, 1404 (1992). Commerce's decision to rely on the factory overhead ratio of a Brazilian silicomanganese producer is therefore appropriate.

4. *SG&A:*

Selling, General & Administrative Expenses ("SG&A") is a ratio of general expenses to the cost of manufacturing. Commerce used the information submitted in the antidumping investigation of *Silicomanganese from Brazil* to calculate a representative ratio of SG&A for a Brazilian silicomanganese producer.[68] From the silicomanganese producer's data, Commerce took the values within the field for general selling expenses ("GNAU"), and calculated an SG&A of 10 percent.

Plaintiffs contest the calculations because the line entitled "GNAU" includes general and administrative expenses but does not include selling expenses. Plaintiffs indicate that the field "TOTGENU," on the other hand, is more appropriate because it represents the *total* SG&A percentage (approx. 18 percent), which includes selling expenses.

Commerce acknowledges that the field GNAU used to calculate the surrogate value for SG&A does not include selling expenses. Commerce therefore requests a remand to correct its valuation of SG&A expenses

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[64] 19 U.S.C. § 1677b(c)(4) (1988). *See also China National Metals & Minerals Import & Export Corp. et al. v. United States*, 11 CIT 859, 866, 674 F. Supp. 1482, 1488 (1987) (explaining that Commerce must reach "the best estimate of foreign market value in the country of export"), *quoting Chemical Products Corp. v. United States*, 10 CIT 626, 631, 645 F. Supp. 289, 293 (1986), *vacated*, 10 CIT 819, 651 F. Supp. 1449 (1986).

[65] Congress did not request that Commerce verify the surrogate information. H. Rep. 576, 100th Cong. 2d Sess 590–91 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623–24.

[66] 19 U.S.C. § 1677b(c)(1).

[67] *Final Determination*, 60 Fed. Reg. at 16,447. 19 U.S.C. § 1677b(c)(1) indicates that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(4) requires Commerce to "utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country."

[68] Prelim. Calc. Memorandum, Pub. Doc. 163 at 4 (A.R. Fiche No. 37 at 4); Prop. Doc. 58 (A.R. Fiche No. 96 at 1); Silicomanganese Worksheet, Nonconfidential Appendix to Memorandum in Support of Plaintiffs' Motion For Judgment Upon The Agency Record, No. 19.

for the Russian producers, and indicates that on remand it will use the field "TOTGENU."

Defendant-intervenors Avisma and Solikamsk argue that if the court concludes that Commerce's calculations are not supported by substantial evidence then the data they placed on the record offer the best alternative. These data show SG&A rates between 11.8 and 13.6 percent.[69] Defendant-intervenors also object that plaintiffs' claim is raised here for the first time, and should therefore not be entertained.

Defendant-intervenors' objection has merit. Plaintiffs had full opportunity to point out the alleged errors contained in Commerce's preliminary determination, but they failed to do so. Since the preliminary investigation, Commerce has calculated the SG&A ratio using the financial data from the GNAU field rather than from the TOTGENU field. Normally, a plaintiff that did not exhaust its administrative remedies would be estopped from raising the claim before this court.[70] The Court, however, recognizes that Commerce has requested remand to correct its calculations of SG&A expenses.

Time and effort will be saved if the calculations challenged before the Court are what Commerce considers to be its true and accurate final results. Therefore, the Court remands to Commerce to recalculate the surrogate value for Russian producers' SG&A expenses because Commerce has admitted that its valuation is not supported by substantial evidence on the record. On remand, all the parties will be afforded the opportunity to review Commerce's proposed corrections, and to make comments on them. Therefore, at this time, the Court does not address the issue of SG&A.

5. *By-Product Credits:*

Chlorine and potassium chloride are by-products of the magnesium production process.[71] Since Avisma and Solikamsk either use or sell part of these by-products, Commerce computed by-product credits in the calculation of the FMV. In the preliminary determination, Commerce accounted for the by-products by subtracting their value from the surrogate value of the cost of materials. In its final determination, accepting plaintiffs' argument, Commerce "subtracted the total by-product cost [sic] from the cost of manufacture (sum of materials, labor, energy, and imputed factory overhead, or "COM")."[72] Deducting the by-product credits from the cost of manufacture rather than from the cost of materials increases the factory overhead amount,[73] because the factory overhead amount is calculated by multiplying a percentage by an amount which has not been reduced by the amount of the by-product credits. Commerce asserts that the increase in the amount of factory overhead

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[69] Respondents' Letter (January 27, 1995), Pub. Doc. 281 (A.R. Fiche No. 57 at 1).

[70] 28 U.S.C. § 2637(d) (1994).

[71] By-products, in general, have sales values which are minor compared to sales values of the main product. Horngren & Foster, *Cost Accounting* 478, 490.

[72] Final Calc. Memorandum, Prop. Doc. 135 (A.R. Fiche No. 127 at 1).

[73] *Id.* at Exhibit F.

reflects the by-product processing costs, thereby "eliminating the need for valuing any additional processing-related elements."[74]

Plaintiffs disagree. Under generally accepted accounting principles ("GAAP"), plaintiffs explain, the by-product processing costs should have been deducted from the by-product revenues. Plaintiffs demonstrate that domestic magnesium producers incur significant processing costs in order to render the by-products suitable for use or sale.[75] Plaintiffs argue that Commerce should have resorted to this information because respondents did not cooperate in furnishing their questionnaire answers. Plaintiffs also assert that Avisma, which uses some of its chlorine by-product to produce titanium sponge, had already claimed the same by-product credit for the same period in another antidumping investigation, *Titanium Sponge from the Soviet Union.*

The parties do not contest Commerce's finding that chlorine and potassium chloride are by-products of magnesium production. A by-product is qualified by its "overall * * * insignificant [value] when compared to the relative value of the * * * subject merchandise."[76] When accounting for by-products, Commerce usually subtracts the sales revenue (or the value of by-products recovered) from the production costs of the product under investigation.[77]

The antidumping statute provides that the foreign market value is determined on the basis of the factors-of-production methodology. 19 U.S.C. § 1677b(c)(1). The factors of production include, but are not limited to, labor, raw materials, energy and other utilities consumed, and capital cost. 19 U.S.C. § 1677b(c)(3). The statute also directs Commerce to add an amount for general expenses to the value of the factors of production. 19 U.S.C. § 1677b(c)(1). The cost of general expenses encompasses factory overhead. *IPSCO, Inc. v. United States,* 965 F.2d 1056, 1059 (Fed. Cir. 1992) (discussing constructed value).[78]

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[74] *Final Determination,* 60 Fed. Reg. at 16,446.

[75] According to plaintiffs' expert, Dr. Neelameggham, processing costs associated with chlorine and potassium chloride are substantial. Letter of Baker & Botts L.L.P. (December 5, 1994), Neelameggham's Affidavit, Prop. Doc. 71 at 2 (A.R. Fiche No.105 at 1).

[76] *Final Determination of Sales at Less Than Fair Value: Sebacic Acid from China,* 59 Fed. Reg. 28,053, 28,056 (May 31, 1994). *See also Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese from Venezuela,* 59 Fed. Reg. 55,436, 55,439 (November 7, 1994); *Final Determination of Less Than Fair Value Sales: Coumarin from China,* 59 Fed. Reg. 66,895, 66,900–01 (December 28, 1994).

[77] *See Final Determination of Sales at Less Than Fair Value: Sebacic Acid from China,* 59 Fed. Reg. 28,053, 28,056 (May 31, 1994); *Final Determination of Less Than Fair Value Sales: Coumarin from China,* 59 Fed. Reg. 66,895, 66,900–01 (December 28, 1994). In *Coumarin from China,* as in this case, Commerce initially accepted an offset to the cost of materials for by-product values, 59 Fed. Reg. at 66,897; however, in the final determination Commerce calculated the offset to the cost of manufacture, 59 Fed. Reg. at 66,901. *See also* Horngren & Foster, *Cost Accounting* 490–93. *Cf.* this accounting methodology *with* that for co-products (also called joint products), which typically have relatively significant sales value. Horngren & Foster, *Cost Accounting* 478. For co-products, Commerce usually first deducts the after-separation costs from the sales revenues and then subtracts the sales revenue from the production costs. *See Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese from Venezuela,* 59 Fed. Reg. 55,436, 55,439 (November 7, 1994). This practice is consistent with generally accepted accounting principles. *See* Horngren & Foster, *Cost Accounting* 483–84.

[78] For nonmarket economy countries, the statute does not provide minimum values for general expenses in terms of percentages of costs, as it does for the calculation of constructed value. The factors-of-production methodology, provided for nonmarket economy countries, applies if Commerce cannot determine the foreign market value of the merchandise on the basis of sale price or constructed value. 19 U.S.C. § 1677b(a).

Commerce allocated by-products processing costs to factory overhead.[79] Commerce determined that the increase in factory overhead was representative of the costs of processing the by-products,[80] and thus eliminated the need for calculating costs related to the by-product processing.[81] In addition, Commerce "adjusted the total by-product cost to reflect the actual purity concentration of the by-product in the production process."[82]

Commerce's methodology reflects a reasonable interpretation of the provisions for nonmarket economy countries, codified under 19 U.S.C. § 1677b(c), because it accounts for both the value of the by-products and the costs related to by-product processing. This methodology is reasonably based on substantial evidence in the administrative record. Commerce verified the indirect costs, including by-product processing costs, at the respondents' facilities in Russia.[83] The incidental nature of by-products and their insignificant value does not warrant costly accounting procedures.[84] This Court cannot substitute its own construction for the reasonable interpretation made by Commerce. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Fujitsu General Ltd. v. United States*, No. 95–1343 at 8 (Fed. Cir. July 3, 1996). Thus, Commerce's determination is sustained.

Finally, plaintiffs' contention that Avisma allegedly duplicated its by-product credits is immaterial to this action, because it is uncontroverted that Commerce has not granted any offset claim in the *titanium sponge* case. That case is not before the Court.

6. *U.S. Sales:*

Razno-Alloys, Ltd. ("Razno"), AIOC Corporation ("AIOC"), and Interlink Metals and Chemicals, S.A. ("Interlink") are three of the trading companies that reported some of their U.S. sales of pure magnesium just prior to, or during, verification.[85]

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[79] As noted before, Commerce accepted plaintiffs' argument that the by-product offset should apply to the COM of the merchandise rather than to the cost of materials. Final Calc. Memorandum, Prop. Doc. 135 (A.R. Fiche No. 127 at 1).

[80] *Final Determination*, 60 Fed. Reg. at 16,446.

The Russian producers treated by-product processing costs as *indirect costs*, including them in factory overhead. Indirect labor and indirect material costs, e.g. for limestone and limemilk, were reported by respondents, and considered by Commerce in its calculations. *See, e.g.*, Commerce's Verification of Factors of Production and Sales of Solikamsk at 5 and 8, Prop. Doc. 117 (A.R. Fiche No. 121 at 13).

Plaintiffs assert that by-product costs are not included in the surrogate overhead percentage calculated by Commerce. Plaintiffs also claim that in another determination Commerce required respondents to subtract additional processing costs from the gross revenues received for the sales. *See Silicomanganese from Venezuela*, 59 Fed. Reg. at 55,439. In *Silicomanganese from Venezuela*, however, the product considered was a *co-product*, which typically has relatively significant sales value. Moreover, the subject country was a market economy, in which case cost data are obviously more accurate.

[81] Plaintiffs object that overhead expenses are unrelated to revenues from the sale of by-products. Subtracting by-product credits from COM does not include the by-product processing costs necessary to render the by-products *saleable*. Rather, plaintiffs claim, Commerce should have first deducted the by-product processing costs from the by-product values, and *then* deducted them from COM.

[82] Final Calc. Memorandum, Prop. Doc. 135 (A.R. Fiche No. 127 at 1).

[83] *Final Determination*, Appendix I, 60 Fed. Reg. at 16,450.

[84] Horngren & Foster, *Cost Accounting* 491. Indeed, Avisma reported that the factory does not calculate by-product processing costs. Letter of Wilmer, Cutler & Pickering of October 11, 1994, submitting Avisma's response to Commerce's questionnaire, at 21, Prop. Doc. 40 (A.R. Fiche No. 88 at 21).

[85] Verification includes Commerce's visit "with producers or resellers in order to verify the accuracy and completeness of submitted factual information." 19 CFR § 353.36(c) (1995).

At the start of the investigation, Razno reported one sale of magnesium directed to the United States, and declared that the major volume of sales during the POI was directed to "'w/house [warehouse] Kotka and/or Loviisa and/or Rotterdam' and 'FOB Kotka'."[86] Subsequently, Razno submitted information on ten additional sales of stockpile magnesium.[87] Commerce verified Razno's sales documentation in Zurich, Switzerland, where the accounts and sales records were maintained,[88] and found that Razno had reported all of its sales made during the POI. Razno justified its initial omission of the ten sales by declaring that it was unaware that they were destined for the U.S. market.[89] Commerce verified Razno's claim and found no discrepancies.[90] However, Commerce's examination of "Razno's sales ledgers and contract files revealed two POI U.S. sales * * * that had not been reported as POI sales to the United States,"[91] apparently because the final destination was not indicated in the invoice.[92]

Plaintiffs claim that the information which Razno failed to report was so significant that Commerce should have questioned the veracity of Razno's entire submission, and, in accordance with Commerce's common practice, resorted to total or partial best information available ("BIA") to calculate dumping margins.[93] Instead, plaintiffs argue, Commerce departed from its standard practice without any explanation.[94]

Plaintiffs also censure Commerce's treatment of late submissions from two other trade companies, AIOC and Interlink. During its verification, AIOC reported the existence of a purchase contract which had not been included in its response to Commerce's questionnaire.[95] Twenty-one sales were connected to this purchase contract, and were subsequently verified by Commerce.[96] Similarly, during verification Interlink provided Commerce with information about a number of sales

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[86] Razno's Letter, Pub. Doc. 74 (A.R. Fiche No. 17 at 7).

[87] Letter of Wilmer, Cutler & Pickering (October 26, 1994), Pub. Doc. 159 (A.R. Fiche No. 36 at 16). Stockpile magnesium is presumed to have been all channeled into the U.S. market. *See* Razno Verification Report at 2, Prop. Doc. 97 (A.R. Fiche No. 120 at 2).

[88] Razno Verification Report, Prop. Doc. 97 (A.R. Fiche No. 120 at 1).

[89] *Id.* at 3.

[90] *Id.*

[91] *Id.*

[92] Razno Verification Exhibit 4 (A.R. Fiche No. 140 at 1, 25, 29).

[93] Plaintiffs also point out that numerous documents establish the existence of another U.S. sale during the POI. Amalgamet Verification Exhibit 9, Prop. Doc. 115 (A.R. Fiche No. 120 at 93; Fiche 177 at 46). Nevertheless, these documents refer to sales of different quantities of magnesium for which there is no evidence that the destination was the United States.

[94] Plaintiffs rely on *Atchinson, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (holding that an agency abuses its discretion by not offering adequate explanation for its failure to follow its own precedent); *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 834 F. Supp. 413, 418 (1993) ("It is 'a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure * * *.'") (quoting *Citrosuco Paulista*, 12 CIT at 1209, 704 F. Supp. at 1088 (1988)); *National Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 553, 779 F. Supp. 1364, 1369 (1991) ("When an agency relies on its methodologies and procedures, it 'must either follow its existing precedents or provide a reasonable explanation for its deviation or noncompliance.'") (quoting *Western Conference of Teamsters v. Brock*, 13 CIT 169, 181, 709 F. Supp. 1159, 1169–70 (1989) and *ILWU Local 142 v. Donovan*, 9 CIT 620, 625 (1985)).

[95] Letter from AIOC (December 15, 1994), Prop. Doc. 73 (A.R. Fiche No. 105 at 34). AIOC's verification was conducted on December 15–16, 1994 and February 8–9, 1995, at AIOC's headquarters in New York, NY. AIOC Verification Report, Prop. Doc. 122 (A.R. Fiche No. 121 at 61).

[96] AIOC Verification Report, Prop. Doc. 122 (A.R. Fiche No. 121 at 61).

not included in its questionnaire response, thereby increasing the total quantity of magnesium related to its sales.[97] Commerce examined logbooks and all sales contracts filed within the POI, noting no evidence of unreported sales to the U.S.[98]

Plaintiffs claim that Commerce should have rejected AIOC and Interlink's sales submissions as untimely, and used BIA instead, or explained its diversion from its standard practice.

The antidumping statute requires Commerce to use BIA whenever Commerce is "unable to verify the accuracy of the information submitted."[99] Verification includes "access to all files, records, and personnel of the producers, resellers, importers, or unrelated purchasers which the Secretary considers relevant to factual information submitted."[100] If the agency is unable to verify within a specific time the accuracy and completeness of the information submitted, it will use BIA.[101] Similarly, Commerce will use BIA if a party refuses or is unable to provide the information requested, or if the party significantly impedes an investigation.[102] This is consistent with "the basic purpose of the statute: determining current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (1990). Nevertheless, the statute does not define explicitly what constitutes *best* information available.[103]

The absence of a statutory definition of BIA vests the administering agency with broad discretion. The agency's construction of BIA, therefore, must be accorded considerable deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–44 (1984); *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185 (Fed. Cir. 1993). In deciding whether to resort to any BIA, the agency must consider the cooperation shown by the parties to the investigation "to gather the data needed for an accurate determination." *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984). Noncooperation may warrant the agency's "use of whatever other best information it may have available." *Id.*[104] "Commerce's discretion to determine whether a respondent has complied with an information request" is consistent with "the discretion afforded Commerce in its administration of the antidumping laws." *Daido Corp. v. United States,* 893 F. Supp. 43, 49 (CIT 1995) (citing *Smith-Corona Group v. United States,* 713 F.2d 1568,

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[97] Interlink Verification Report at 4, Prop. Doc. 99 (A.R. Fiche No. 120 at 11).

[98] *Id.*

[99] 19 U.S.C. § 1677e(b) (1988).

[100] 19 C.F.R. § 353.36(c) (1995).

[101] 19 C.F.R. § 353.37(a)(2) (1995). Even when the agency is not able to verify each item, the verification is supported by substantial evidence if the approach taken by the agency is reasonable and adequate under the circumstances. *See Floral Trade Council v. United States,* 17 CIT 392, 399, 822 F. Supp. 766 (1993).

[102] 19 U.S.C. § 1677e(c) (1988). *See also* 19 C.F.R. § 353.37 (1995).

[103] The legislative history, even though explaining that it consists of "the most up-to-date information available," does not offer further guidance. H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979).

[104] These considerations suggested that "one may view the best information rule * * * as an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest." *Atlantic Sugar,* 744 F.2d at 1560. Nevertheless, "[n]othing in the best information rule or its legislative history defines a standard of investigative thoroughness." *Id.* at 1561.

1571 (1983)). The same discretion allows Commerce to request additional information from respondents before resorting to BIA.[105]

In this case, the information necessary to reach an accurate dumping determination was made available by the respondents and was verified as accurate and reliable by Commerce. Commerce considered the initial inaccuracies in the data as inadvertent errors. In the end, the errors were corrected and the data were verified.[106] The low number of U.S. sales of magnesium allowed Commerce to conduct thorough and independent verifications, during which Commerce examined all the POI data, matching the data received from the producers with those received from the resellers/exporters.[107] Plaintiffs correctly point out that Commerce usually rejects untimely submissions and uses BIA instead, because "the late submission of this information [leaves] no opportunity to analyze the sales reporting and provide deficiency questions, and no opportunity for Petitioners to analyze and comment on these sales."[108] In this case, however, Commerce rendered a thorough verification, and plaintiffs were offered full opportunity to comment on the verification report.[109] Therefore, Commerce did not depart from its usual practice.

Finally, Commerce's verification does not contain any methodological problems or mathematical errors. Indeed, plaintiffs do not claim that the calculation of respondents' margins is incorrect. Plaintiffs' claim, rather, proposes a blind, punitive use of BIA, which is clearly disfavored. *See Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990). Commerce determined that the errors contained in respondents' answers to Commerce's questionnaire "were inadvertent and were, in the end, verified;" that the margins imputed to those companies were correct; that the record was "complete and accurate."[110] Upon review of the administrative record, the Court concludes that Commerce's determination to rely on the reported information and not to resort to any BIA was neither arbitrary nor capricious, is supported by substantial evidence, and is otherwise in accordance with law.

7. *Third-country Reseller/exporters' SG&A Expenses and Profits:*

Most of the magnesium sold to the United States was exported by trading companies located in third-country market economies. Com-

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105 *See Hussey Copper, Ltd. v. United States,* 895 F. Supp. 311, 314 (CIT 1995).

106 *Final Determination,* 60 Fed. Reg. at 16,445.

107 Razno Verification Report, Prop. Doc. 97 (A.R. Fiche No. 120 at 1); Amalgamet Verification Report, Prop. Doc. 110 (A.R. Fiche No. 120 at 69); AIOC Verification Report, Prop. Doc. 122 (A.R. Fiche No. 121 at 61); Interlink Verification Report, Prop. Doc. 99 (A.R. Fiche No. 120 at 11).

108 Plaintiffs' Memorandum at 93 (citing *Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products and Certain Cold-Rolled Steel Flat Products from the Nederlands,* 58 Fed. Reg. 37,199, 37,203 (1993)) and 94 (citing *Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rods from Brazil,* 58 Fed. Reg. 68,862, 68,865 (1993)).

109 In response to plaintiffs' desire to comment upon the verification outline *before* verification, defendant notes that, "[g]iven that Commerce verified every U.S. sale, it is difficult to imagine how Commerce would have benefitted from plaintiffs' additional comments on the verification outline." (Defendant's Memorandum at 71.) Indeed, plaintiffs do not claim in any of their submissions to the Court that they were not afforded the opportunity to analyze and comment on U.S. sales.

110 *Final Determination,* 60 Fed. Reg. at 16,445. On the other hand, Commerce agreed with petitioners that two other companies, Hochschild and Greenwich Metals, had incorrectly reported certain sales, and corrected the margins assigned to those companies accordingly. *Id.*

merce did not include these companies' SG&A expenses and profits in the calculation of the FMV of Russian magnesium.[111]

Plaintiffs claim that Commerce's exclusion of reseller/exporters' SG&A and profit amounts to a failure to include the costs of the exporter together with those of the producer, "to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise."[112] By doing so, plantiffs aver, Commerce did not compare United States price ("USP") and FMV on a fair basis, i.e., at a common point in the chain of commerce. Plaintiffs argue that USP was based on resellers' U.S. selling prices, whereas reseller/exporters' constructed value ("CV") included only the SG&A expenses and profits of the producers but not of the intermediate resellers and the final reseller/exporter.[113]

The Court observes that for nonmarket economy countries the statute mandates that the FMV of the merchandise be determined "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses, as required by subsection (e) of this section." 19 U.S.C. § 1677b(c)(1) (1988). The amount for general expenses and profit is "equal to that usually reflected in sales of merchandise * * * which are made *by producers* in the country of exportation * * *." 19 U.S.C. § 1677b(e)(1)(B) (1988) (emphasis provided).

Thus, the statutory amount for general expenses and profit is limited to sales made by producers in the country of exportation. The statute does not mention *resellers'* sales. Therefore, the only general expenses and profit to be accounted for are those of the producers and not the resellers. The language of the statute provides an unambiguous directive for the agency and for the court, to which the agency and the court must give effect. This result accords with the recent decision of this Court in *Rhone-Poulenc, Inc., v. United States,* slip op. 96–74 at 20–21 (Ct. Int'l Trade, May 9, 1996).

The statute requires a comparison between USP and FMV based on the factors of production to which general expenses, profit and the cost of containers are added. 19 U.S.C. § 1677b(c).[114] General expenses are based on the sales made by producers in the country of exportation. This

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[111] *Final Determination,* 60 Fed. Reg. at 16,447.

[112] 19 U.S.C. § 1677(28) (1994). Plaintiffs explain that, even though this provision was only recently introduced as a result of the trade agreement arising from the Uruguay Round, legislative history indicates that it codifies existing practice. H.R. Doc. No. 316, 103d Cong., 2d Sess. 171 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4177 ("[I]n situations where the producer and the exporter are separate companies, the Administration intends that Commerce may continue to calculate constructed value based on the total profit and total SG&A expenses realized and incurred by both companies.").

[113] *Final Determination,* 60 Fed. Reg. at 16,444–45. Thus, plaintiffs state, Commerce "erroneously compared FMV determined at the producer point to USP determined at the reseller point." (Plaintiffs' Reply Brief at 36.)

[114] For market economy countries, the statute simply refers to *home market sales* values, without referring to "general expenses and profit." *See* 19 U.S.C. § 1677b(a)(1)(A).

is in accord with Commerce's precedent[115] and with Commerce's determination in this case.

Plaintiffs have acknowledged that a circumstance of sale adjustment "may be an appropriate mechanism for adjusting FMV to account for additional reseller costs." (Plaintiffs' Reply Brief at 45.) However, plaintiffs make no such claim. Rather, they focus on Commerce's alleged unexplained deviation from its practice by excluding resellers' SG&A from FMV.

In asserting that Commerce has an established practice to include reseller expenses in CV, plaintiffs rely on *Fresh and Chilled Atlantic Salmon from Norway,*[116] in which Commerce included the exporters' expenses in the calculation of FMV. *Salmon from Norway,* however, is distinguishable from the present case on at least two grounds: First, the producers had no selling expenses because most of their selling activities were handled by the exporters;[117] Second, the FMV was based on third country sales.[118] To accurately calculate the cost of production of salmon sold by the exporters, Commerce added the exporters' SG&A to the salmon farmers' cost of production.[119] Thus, in *Salmon from Norway,* Commerce had to calculate a third-country sale value which necessarily included the exporters' SG&A. This situation, however, is different from the one that plaintiffs presented in their petition.

Plaintiffs also rely on *Tubeless Steel Disc Wheels From Brazil,*[120] which involved merchandise produced in a market economy and sold only to the United States. Since the merchandise was not sold in the home country nor to third countries, Commerce had to calculate CV, and used U.S. selling expenses as a surrogate.[121]

The Court finds that *Salmon from Norway* and *Tubeless Steel Disc Wheels From Brazil* are inapposite, and that Commerce did not depart from its practice.

Finally, no evidence points to mistakes committed by Commerce in the construction of FMV. Commerce included all costs related to the Brazilian production and sale of merchandise to the first unrelated seller in the home market.[122] Commerce's action was in accordance with the the

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115 *See Certain Partial-Extension Steel Drawer Slides with Rollers from the People's Republic of China,* 60 Fed. Reg. 54,472 (1995); *Final Determination of Sales at Less Than Fair Value: Coumarin from the People's Republic of China,* 59 Fed. Reg. 66,895, 66,899 (1994); *Final Determination of Sales at Less Than Fair Value: Certain Paper Clips from the People's Republic of China,* 59 Fed. Reg. 51,168, 51,171 (1994); *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 Fed. Reg. 22,585, 22,588 (1994); *Final Determination of Sales at Less Than Fair Value: Certain Compact Ductile Iron Waterworks Fittings and Accessories Thereof from the People's Republic of China,* 58 Fed. Reg. 37,908, 37,909–10 (1993). Plaintiffs note that none of these cases involved USP based on selling prices of market-economy resellers. The issue, however, is not whether market-economy costs should be favored, but whether *resellers'* expenses should be included in the calculation of general expenses under section 1677b(e).

116 *Final Determination of Sales at Less Than Fair Value: Fresh and Chilled Atlantic Salmon from Norway,* 56 Fed. Reg. 7,661 (1991).

117 56 Fed. Reg. at 7,666.

118 56 Fed. Reg. at 7,662, 7,663.

119 56 Fed. Reg. at 7,662, 7,663.

120 *Final Determination of Sales at Less Than Fair Value: Tubeless Steel Disc Wheels From Brazil,* 52 Fed. Reg. 8,947 (1987).

121 52 Fed. Reg. at 8,948.

122 Final Calc. Memorandum, Exhibit F, Prop. Doc. 135 (A.R. Fiche No. 127 at 1).

statute, which grants Commerce discretion to select the appropriate surrogate value for SG&A expenses. In the case of an NME country, Commerce usually refers to surrogate values because of the distortions to which NME costs and prices are subject. Nevertheless, Commerce *may* use prices paid by the NME country to market-economy suppliers in combination with surrogate values, when this serves the statutory purpose of "determining current margins as accurately as possible," *Rhone-Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990), and on "fair and equitable basis," *Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1573 (Fed. Cir. 1994).[123] Commerce did not deem it appropriate to deviate from the surrogate values calculated on the basis of the Brazilian information and to follow a different methodology. The Court finds that Commerce's determination is in accordance with law.

8. *Export Taxes and Mandatory Monetary Conversion:*

Avisma and Solikamsk reported that, based on the quantity exported, their magnesium sales were subject to Russian export duties and administrative procedure fees.[124] As the exporting companies, Solikamsk and Avisma were responsible for paying these duties and fees, either in rubles or in dollars.[125] Commerce's final determination stated that "[w]e made no deduction from USP to account for exporter-incurred selling expenses, nor did we deduct export taxes paid by Russian companies to the Russian government because the actual amounts paid are an internal expense within an NME country."[126]

Commerce has requested that the Court remand Commerce's determination on Russian export taxes. Commerce has declared that the agency "is currently reevaluating its interpretation of section 772 of the Act as applied to nonmarket economies," and "the legal and policy bases for its treatment of expenses related to the USP."[127]

A remand is warranted to ensure a consistent approach in this and other continuing nonmarket economy proceedings. Consequently, the Court does not address the issue of the deductibility of export taxes from USP, and remands to Commerce on the question of whether the export taxes paid by an NME producer can be deducted from USP.

Plaintiffs' second claim is that Avisma and Solikamsk's requirement to sell half of their hard currency revenue for rubles to a Russian bank within fourteen days of receipt[128] amounts to "an implied export tax."[129] This exchange rate balancing requirement, according to plain-

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[123] *See Final Determination of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans from the People's Republic of China,* 56 Fed. Reg. 55,271, 55,275 (1991); *Tianjin Mach. Import and Export Corp. v. United States,* 16 CIT 931, 938–41, 806 F. Supp. 1008, 1016–18 (1992); *Lasko Metal Products, Inc. v. United States,* 16 CIT 1080–82, 810 F. Supp. 314, 316–18 (1992).

[124] Avisma Sections C and D Questionnaire Response, Pub. Doc. 72 (A.R. Fiche No. 14 at 1); Solikamsk Sections C and D Questionnaire Response, Pub. Doc. 73 (A.R. Fiche No. 15 at 1).

[125] *Id.* Avisma and Solikamsk paid these export taxes mostly in dollars. Id.

[126] *Final Determination,* 60 Fed. Reg. at 16,442.

[127] Defendant's Memorandum at 50.

[128] *See* Solikamsk Sections C and D Questionnaire Response, Attachment I at 9, Pub. Doc. 73 (A.R. Fiche No. 15 at 1); Prop. Doc. 18 (A.R. Fiche No. 79 at 1).

[129] *Coumarin,* 59 Fed. Reg. at 66,895–96.

tiffs, represents a direct cost to producers because it involves the application of a less favorable government exchange rate. Plaintiffs acknowledge that they are raising this claim for the first time here. They point out, however, that Commerce refused to make adjustments for export taxes, and that therefore it would have been futile for plaintiffs to raise this other export tax issue, the exchange rate balancing requirement.[130] Consequently, plaintiffs contend that it is appropriate to address their second claim now, together with the export taxes claim.

Defendant-intervenors insist that plaintiffs are barred from raising this claim here. The fact that plaintiffs mentioned the exchange rate balancing requirement once in a submission discussing whether or not Russia could be considered a market economy country[131] is insufficient to include this question within the broad issue of the export taxes. *See Timken,* 16 CIT 429, 436, 795 F. Supp. at 442–44 (citing *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990)) (holding that it is insufficient to argue that raising broad issues implicitly raises specific issues).

Certainly, plaintiffs could have raised this claim before the agency. Plaintiffs fully discussed the export tax issue during the proceeding, but never raised or even addressed the question of the exchange rate balancing requirement. The two claims are essentially different. One constitutes an export tax, whereas the other resembles an involuntary loan made in currency. Plaintiffs have not demonstrated that the mandatory conversion requirement is included in the export taxes issue, or that the two issues are related in any way.

A plaintiff that did not exhaust its administrative remedies is estopped from raising the claim before the court. 28 U.S.C. § 2637(d) (1994). This Court would usurp the agency's function if it examined Commerce's determination upon a ground not presented before Commerce, and for which Commerce did not have an opportunity to consider the matter and to state the reason for its determination. *Unemployment Compensation Comm'n of Alaska v. Aragon,* 329 U.S. 143, 155 (1946). *See also Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990). Accordingly, the Court concludes that plaintiffs' failure to raise the issue of the exchange rate balancing requirement before Commerce bars plaintiffs from raising that issue before the Court now for the first time.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to recalculate the surrogate value for SG&A for the Russian producers, and to consider whether the export taxes paid by an NME producer should be deducted from USP. Remand results are due within sixty days of the date this opinion is entered. Comments and responses

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[130] Plaintiffs cite *American Alloys, Inc. v. United States,* 17 CIT 8, 15, 810 F. Supp. 1294, 1299–1300 (1993); *Rhone Poulenc, S.A. v. United States,* 7 CIT 133, 135, 583 F. Supp. 607, 609–10 (1984); *Associacion Colombiana de Exportadores de Flores v. United States,* 916 F.2d 1571, 1575 (Fed. Cir. 1990); *Cutler v. Hayes,* 818 F.2d 879, 891 (D.C. Cir. 1987).

[131] Letter from Baker & Botts L.L.P. (October 21, 1994), Pub. Doc. 143 (A.R. Fiche No. 33 at 34–35).

are due within thirty days thereafter. Any rebuttal comments are due within fifteen days after the date comments or responses are due. Plaintiffs' motion upon the agency record is denied in all other respects.

(Slip Op. 96–149)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., DEFENDANT-INTERVENORS

Court No. 95–02–00214

Plaintiff, The Timken Company, brings this action pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record contesting the decision of the Department of Commerce, International Trade Administration ("Commerce"), to apply the scope determination entitled *Final Affirmative Determination in Scope Inquiry on Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof From Japan*, 60 Fed. Reg. 6519 (1995), to only pending and future reviews.

Held: This case is remanded to Commerce to explain on the record its reasons for limiting the application of the subject scope determination to pending and future reviews. If Commerce is unable to provide such an explanation, it is ordered to apply the scope ruling to all merchandise subject to the original antidumping duty order imported into the United States after the suspension of liquidation.

[Plaintiff's motion granted in part and denied in part; case remanded.]

(Dated August 28, 1996)

Stewart and Stewart (Terence P. Stewart, *James R. Cannon, Jr.* and *William A. Fennell)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeanne E. Davidson,* Assistant Director, and *Laurel A. Loomis);* of counsel: *Kira M. Alvarez,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Richard M. Belanger, Neil R. Ellis, Niall P. Meagher and *Todd J. Friedbacher)* for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Timken Company ("Timken"), brings this action pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record contesting the decision of the Department of Commerce, International Trade Administration ("Commerce"), to apply the scope determination entitled *Final Affirmative Determination in Scope Inquiry on Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof From Japan ("Scope Determination"),* 60 Fed. Reg. 6519 (1995), to only pending and future reviews.

BACKGROUND

On October 6, 1987, Commerce published an antidumping duty order covering tapered roller bearings ("TRBs") and parts thereof from

Japan. *See Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan,* 52 Fed. Reg. 37,352 (1987). In July 1993, during the course of a review of the antidumping order covering the period of 1990–91, Timken submitted information to Commerce concerning certain forged rings imported by Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo") that were not being included in the scope of the antidumping order because they were being misclassified as iron or steel forgings under subheading 7326.19.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Thereafter, Customs informed Koyo that imported forgings should be classified as bearing parts under either subheading 8482.99.10 or subheading 8482.99.30 of the HTSUS rather than as iron or steel forgings.

On September 17, 1993, Koyo submitted a request that Commerce confirm that rough forgings, including tower forgings, hot forgings and cold forgings (collectively "rough forgings"), fall outside the scope of the subject order. In response, Commerce initiated a scope inquiry on September 28, 1993.

On December 9, 1993, Commerce issued its final determination in the administrative reviews for the periods of 1990–91 and 1991–92. *See Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 58 Fed. Reg. 64,720 (1993). On February 2, 1995, Commerce published its final determination regarding the scope inquiry. *See Scope Determination,* 60 Fed. Reg. at 6519. In reference to the effective date of the scope ruling, Commerce stated the following:

> A scope determination is, by law, a clarification of what the scope of the order was at the time the order was issued. Therefore, the Department will incorporate this decision into all pending reviews of this order as well as all future reviews.

60 Fed. Reg. at 6523.

Timken filed the present action on February 24, 1995, challenging Commerce's decision to apply the scope ruling to only pending and future reviews. On September 18, 1995, the Court denied Koyo's motion to dismiss this action. The United States Court of Appeals for the Federal Circuit dismissed Koyo's subsequent appeal on October 27, 1995.

DISCUSSION

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

Timken contests Commerce's decision to limit the application of the scope determination to pending and future reviews. Timken maintains that the nature of a scope ruling is such that it cannot change the parameters of the subject antidumping duty order. As such, Timken argues that Commerce must calculate dumping margins and direct Customs to assess antidumping duties with respect to all merchandise within the scope of the antidumping duty order. Commerce's failure to do so, according to Timken, constitutes an abuse of discretion. Pl.'s Mem. Supp. Mot. J. Agency R. at 10–27.

Commerce responds by requesting a remand for the opportunity to further explain the rationale underlying its decision to apply the scope determination prospectively. Commerce suggests that the scope ruling does not provide a sufficient basis for review by the Court. Commerce claims that where a sufficient explanation on the record is lacking, the Court may remand the case for Commerce to provide a basis for its actions. Def.'s Resp. to Pl.'s Mot. J. Agency R. at 4–5.

Koyo, defendant-intervenor, opposes a remand contending that Timken failed to exhaust its administrative remedies. Koyo insists that this action represents the first time Timken has raised this issue despite requests from Commerce to address the application of the scope ruling. Thus, Koyo argues that Timken failed to comply with the exhaustion requirements of 28 U.S.C. § 2637(d) (1994). Koyo's Opp'n to Pl.'s Mot. J. Agency R. at 10–13. Koyo further submits that there is no provision of the antidumping law which provides for the relief sought by Timken. *Id.* at 13–18.

In rebuttal, Timken contends that a remand for Commerce to explain its position is inappropriate because the law does not give Commerce any discretion in this area. Timken submits that as a matter of law, scope determinations relate back to the date the original antidumping duty order was issued. Pl.'s Reply to Opp'n to Mot. J. Agency R. at 2–3.

As a preliminary matter, the Court finds that Timken properly exhausted administrative remedies before bringing the present action.[1] Koyo's arguments concerning exhaustion focus on language in a letter by Commerce dated February 25, 1994, instructing interested parties in the scope inquiry as follows:

> Interested parties should include in their written comments on the preliminary determination comments on how the Department should instruct Customs to implement its decision, should the final

[1] 28 U.S.C. § 2637(d) requires that "[i]n any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."

> determination also be affirmative. Specifically, the parties should comment on end-use certification.

Koyo's Opp'n to Pl.'s Mot. J. Agency R., Ex. 3, P.R. Doc. No. 26. In its brief, Koyo quoted the language of this letter but omitted the reference to end-use certification. *See* Koyo's Opp'n to Pl.'s Mot. J. Agency R. at 10. Contrary to Koyo's assertions, this letter does not specifically request that the parties comment on prospective versus retroactive application of the scope ruling.

Further, it is clear from the record that Timken actively sought to have Koyo's forged TRB rings included within the scope of the review. While Timken may not have specifically argued for retroactive application of the scope ruling, in its brief submitted during the scope proceeding on November 15, 1993, Timken argued that Commerce "should find that rough forgings have always been, and still are, covered by the scope of the original investigation." Pl.'s Mem. Supp. Mot. J. Agency R., Ex. A, P.R. Doc. No. 10, at 4. This language demonstrates that Timken intended the scope ruling to be applied to all imports subject to the original antidumping duty order. Thus, the Court concludes that Timken sufficiently raised this issue at the administrative level to satisfy the exhaustion requirement.

As for the merits of the case, the Court recently addressed the issue of the application of scope determinations in *FAG Kugelfischer Georg Schafer KGaA v. United States,* 20 CIT ____, ____, Slip Op. 96–108, at 10–13 (July 10, 1996). In *FAG Kugelfischer,* Commerce defended its decision to apply a scope ruling retroactively. The Court agreed with Commerce's decision, finding that "[o]nce Commerce determines through a scope ruling that a particular product is indeed covered by the order, Commerce cannot exclude such merchandise from the order when determining the proper amount of antidumping duties." *FAG Kugelfischer,* 20 CIT at ____, Slip Op. 96–108, at 10–11.

However, in order to reach a judgment on the administrative record, the Court must have a basis for understanding the reasons for Commerce's actions. *See S.E.C. v. Chenery Corp.,* 332 U.S. 194, 196 (1947); *see also NTN Bearing Corp. of Am. v. United States,* 19 CIT ____, ____, 903 F. Supp. 62, 71 (1995). In addition, where an explanation is lacking on the record, *post hoc* rationalization for Commerce's actions is insufficient. *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168–69 (1962); *see also Sugiyama Chain Co. v. United States,* 19 CIT ____, ____, 880 F. Supp. 869, 874–75 (1995).

Commerce gave no indication on the record of its reasons for applying the scope ruling prospectively. Therefore, the Court will remand this action to give Commerce the opportunity to explain its rationale. However, as Commerce has argued before and as this Court has already decided, scope determinations merely clarify the scope of an existing order and, therefore, apply to all entries of merchandise determined to be within the parameters of the order. Thus, on remand, if Commerce is unable to articulate a specific reason for its decision to depart from the

general rule regarding the application of scope rulings, it must revise the scope determination and apply it to all importations of merchandise subject to the antidumping order.

CONCLUSION

For the foregoing reasons, the Court remands this case to Commerce to articulate a specific rationale for its decision to apply the scope ruling to only pending and future reviews. If Commerce is unable to do so, it must revise the scope ruling and initiate administrative review proceedings in order to apply the scope determination to all importations of merchandise covered by the antidumping order that have entered the United States subsequent to the suspension of liquidation and that have not previously been included in administrative reviews.

Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within forty-five (45) days thereafter. Any rebuttal comments are due within thirty (30) days after the date responses or comments are due.

(Slip Op. 96–150)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND MICHAEL KANTOR, SECRETARY OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–04–00257

(Dated August 28, 1996)

ORDER

TSOUCALAS, *Judge:* On June 7, 1995, this Court, in *NTN Bearing Corp. of Am. v. United States*, 19 CIT ___, 888 F. Supp. 1210 (1995), *rev'd*, 1996 WL 413567 (Fed. Cir. 1996), affirmed the *Final Results of Redetermination Pursuant to Court Remand, NTN Bearing Corporation of America, American NTN Bearing Mfg. Corporation and NTN Corporation v. United States, Slip Op. 94–200 (December 29, 1994) and Slip Op. 95–1 (January 3, 1995) ("Remand Results")* filed by the Department of Commerce, International Trade Administration ("Commerce"). *Inter alia,* the Remand Results complied with the Court's order directing Commerce to impose a 10% limit upon the deviation factors in the five-criteria model-match methodology used in *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,960 (Feb. 11 1992), as amended by *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Amendment*

to Final Results of Antidumping Duty Administrative Review, 57 Fed. Reg. 9,104 (Mar. 16, 1992), (collectively *"Final Results").*

On July 10, 1996, the United States Court of Appeals for the Federal Circuit, Appeal No. 95–1477, remanded this case to the Court, in conformity with *Koyo Seiko Co. v. United States,* 66 F.3d 1204 (Fed. Cir. 1995). *NTN Bearing Corp. of Am. v. United States,* 1996 WL 413567 (Fed. Cir. 1996). In accordance with the appellate court's order and mandate in Appeal No. 95–1477, it is hereby

ORDERED that Commerce is to recalculate the dumping margins in the Final Results of its third administrative review of tapered roller bearings ("TRBs") manufactured and/or distributed by NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. without imposing the 10% cap to each of the five criteria used to match U.S. TRBs with home market TRBs; and it is further

ORDERED that the remand results are due within thirty (30) days from the date that this order is entered.

(Slip Op. 96–151)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND MICHAEL KANTOR, SECRETARY OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–03–00168

(Dated August 29, 1996)

ORDER

TSOUCALAS, *Judge:* On June 7, 1995, this Court, in *NTN Bearing Corp. of Am. v. United States,* 19 CIT ___, 888 F. Supp. 1210 (1995), *rev'd in part,* 1996 WL 413567 (Fed. Cir. 1996), affirmed the *Final Results of Redetermination Pursuant to Court Remand, NTN Bearing Corporation of America, American NTN Bearing Mfg. Corporation and NTN Corporation v. United States, Slip Op. 94–200 (December 29, 1994) and Slip Op. 95–1 (January 3, 1995) ("Remand Results")* filed by the Department of Commerce, International Trade Administration ("Commerce"). *Inter alia,* the Remand Results complied with the Court's order directing Commerce to impose a 10% limit upon the deviation factors in the five-criteria model-match methodology used in *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 4,960 (Feb. 11 1992), as amended by *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan; Amendment to Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 9,104 (Mar. 16, 1992), (collectively *"Final Results").*

On July 10, 1996, the United States Court of Appeals for the Federal Circuit, Appeal No. 95–1479, remanded this case to the Court, in conformity with *Koyo Seiko Co. v. United States,* 66 F.3d 1204 (Fed. Cir. 1995). *NTN Bearing Corp. of Am. v. United States,* 1996 WL 413567 (Fed. Cir. 1996). In accordance with the appellate court's order and mandate in Appeal No. 95–1479, it is hereby

ORDERED that Commerce is to recalculate the dumping margins in the Final Results of its third administrative review of tapered roller bearings ("TRBs") manufactured and/or distributed by NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corp. without imposing the 10% cap to each of the five criteria used to match U.S. TRBs with home market TRBs; and it is further

ORDERED that the remand results are due within thirty (30) days from the date that this order is entered.

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